

# **The Uplifted Knife: Exploring the Boundaries of Self-defence**



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### **Summary:**

This thesis provides a critique on the law of self-defence in England and Wales. It demonstrates the general justifiability of the defence, while challenging recent legislative amendments that expand its scope for householders. Location has developed as a key variable in cases of self-defence, with greater rights of protection ascribed to householders defending against intruders than is permitted in other situations. The reasons behind this increased protection are criticised, and it is argued that it is more appropriate to apply the same standard of self-defence regardless of the location of the attack. The research also explores the complex relationship existing between the criminal law defence of self-defence and crimes involving offensive weapons in the law of England and Wales. It demonstrates that the law has developed in a contradictory and confusing manner. While self-defence may provide a defence to the infliction of injury to an aggressor, it is unlikely to justify the initial criminal act of carrying an offensive weapon or bladed article in a public place. The reasons for carrying weapons are examined, and it is submitted that in addition to legal attempts to deter and punish possession, proactive initiatives targeted at the community level are required. This is a matter of balancing competing harms, namely, harms to the individual against a risk of harm to society. It is argued that the law has developed appropriate methods for addressing the harms involved in self-defence through application of the reasonable force test. The thesis also highlights the role of the media in shaping public perception of the defence and offences discussed. It also demonstrates the relevance of emotions, primarily fear, and argues for an increased consideration of the power of fear to influence an individual's defensive force, and decision to carry a weapon for protection where appropriate.

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## **Chapter 1: Introduction**

### **1. Introduction**

The term ‘uplifted knife’ derives from the US case of *Brown*, where it was stated that ‘*Detached reflection cannot be demanded in the presence of an uplifted knife*’.<sup>1</sup> This phrase reflects the intertwining of a criminal law defence, self-defence, with the criminal offence of weapon possession or use. It is an apt illustration of the focus of this research enquiry, and the title ‘*The uplifted knife: exploring the boundaries of self-defence*’ conveys the principal aims of this thesis. The central themes under consideration are the extent to which self-defence provides a defence to weapons offences, and the reasons why location is treated as a distinct variable according to the law.

The thesis analyses the scope of self-defence, with a particular focus upon the possession and use of weapons. However, the thesis goes further than this in assessing how far the defence extends, considering the impact of location, the concept of harm, media representations, and the relevance of emotion. It is an ambitious project that spans several disciplines. While its home discipline is naturally law, it ventures into the terrains of criminology, sociology, policy, and at times science. This decision was based on the belief that any study of law must engage with the broader context within which it operates, rather than in a vacuum.<sup>2</sup> This is especially true in relation to the subject matter. Self-defence is a subject of social relevance, as is the phenomenon of carrying weapons. To conduct this study without approaching the field of criminology would have been to set out into darkness. Touching upon these various disciplines has allowed a fuller insight into the complex relationship between self-defence and weapons, and the reasons why people carry items with them in case of attack.

It is necessary to provide a definition of the term ‘weapon’ as it is applied in this study. While the title refers to the ‘uplifted knife’, much of the discussions that follow will also have relevance to other types of weapons. In broad terms, a weapon may be

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<sup>1</sup> *Brown v United States* 256 U.S. 335, 343 (1921).

<sup>2</sup> This pertains to the socio-legal research tradition, although elements of the research enquiry also require application of the doctrinal approach. The methodology employed in this thesis will be explained at section 1.3 of the present chapter.

defined as any article which may be used offensively, in a threatening manner, or to cause harm to others. This is probably the widest interpretation that may be ascribed to the term, as it is not limited to articles that have been specifically created in order to cause harm or facilitate an assault, such as firearms. This definition essentially covers most objects, as it could extend to furniture; decorative items (such as flower vases); kitchen, gardening or DIY appliances; as well as to certain types of animals (for example, dangerous dogs). The dictionary definition describes a weapon as being ‘*an object or instrument used in fighting ... anything that serves to outwit or get the better of an opponent*’.<sup>3</sup> This illustrates that one of the core features of a weapon is the additional power or strength that it gives to its user and this is reflected to an extent within the legal approach to weapons.

The law of England and Wales categorises different weapons based on their nature, purpose and the risk of danger that they pose, providing detailed definitions of what falls within each category. For example, there are distinct offences of selling, manufacturing, possessing and using prohibited weapons to uphold the aim of safeguarding the public. Examples of the different categories of weapons include firearms, offensive weapons and articles with blades or sharp points.<sup>4</sup> While the breadth of the term ‘weapon’ is acknowledged, this thesis concentrates on a narrower category of weapons than the literal meaning of the term. This decision was taken for the purpose of assessing the legal approach and effectiveness of the law, and to facilitate the exploration of the connection with the defence of self-defence. It was therefore necessary to limit the consideration to two main legal classes of weapons, namely, offensive weapons and articles with blades or sharp points.<sup>5</sup> These categories of offences are distinct yet closely related, and a comparison of their interpretation and scope provides the foundation for this enquiry. Furthermore, in relation to the examination of the reasons behind weapons possession in public places and in order to gain insight into the social context, the consideration is focused upon the possession of knives as a specific example.

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<sup>3</sup> J. Butterfield et al. (eds), *Collins English Dictionary: Complete and Unabridged*, (6th ed, HarperCollins Publishers, Glasgow, 2003), at 1818.

<sup>4</sup> For a discussion of these classifications and different types of weapons, see section 3.2.

<sup>5</sup> As will be seen in Chapter 3, these offences are set out in section 1 of the Prevention of Crime Act 1953, and section 139 of the Criminal Justice and Immigration Act 1988 respectively.

The reason for selecting knives and sharp instruments as a focal point is due to the higher incidence of crime involving such weapons in England and Wales than other types of weapons, and their easily accessible nature.<sup>6</sup> This does not by any means suggest that other weapons are not used offensively or defensively. The law in relation to offensive weapons and articles with blades or sharp points is examined in Chapter 3, as this is how the law has developed to define these objects. As mentioned, knives are the principal type of weapon considered with regard to examining the reasons behind possession and are discussed as a form of case study. However, many cases that have reached the courts where self-defence has been raised as a defence involve the use of various types of weapons, and are not limited to knives. The weapons used in these cases are discussed as and when they arise, which means that the relationship between the defence and weapons offences has a wider reach beyond the focus on knives.

As is discussed in Chapter 3,<sup>7</sup> the nature of a weapon and the gravity of harm that it is capable of inflicting, could influence whether or not the force used was reasonable in the circumstances, and consequently impact whether or not self-defence will provide a defence to the use of the article. While the dangerous nature of a weapon is certainly a factor for consideration, the use of a particularly dangerous item will not automatically bar a plea of self-defence, but may pose a higher obstacle in the form of proving 'reasonable force'. This shows the importance of context for self-defence, as it is not merely the nature of the weapon that is instructive, but also the manner and circumstances in which it is used.

### **1.1 The aims of the research and the original contribution**

The core of this study is the exploration of the reasons why self-defence is a permissible action, and the examination of various problematic circumstances. It is a common misconception that self-protection provides a good reason for possessing weapons, and this can present problems for individuals acting out of fear. There exists a need for increased public awareness and understanding of the law in this regard, and the thesis builds upon the existing material within the field to achieve this goal.

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<sup>6</sup> For further discussion of this, see section 3.1.2.

<sup>7</sup> See section 3.3 for a consideration on the relevance of the nature of the weapon.

The research assesses the present position of the law, and critically explores its depth and breadth. The thesis appreciates various modes of social change and the power of public opinion, for example the influence of media representations in shaping public perception of crimes involving weapons, as well as the defence of self-defence. The original contribution of the thesis is made by way of a three-part claim. First, the exploration of the relationship between self-defence and weapons offences; second, the enquiry into the location based distinctions drawn within the law of self-defence; and third, the variety of different aspects and perspectives that have been combined in order to address the central themes of the thesis.

With regard to the first claim, many studies have discussed self-defence with regard to its potential and its limitations as a defence for the use of lethal force.<sup>8</sup> There has been much discussion in relation to its justificatory theories and hypothetical scenarios.<sup>9</sup> This thesis revisits these previous discussions in the literature within the context of the research, as they are necessary considerations for any study on self-defence to acknowledge. However, proving or disproving the relevance of these theories is not the primary aim of this research. Rather, the thesis focuses on a different enquiry, and one that has been underexplored. The literature on the relationship between self-defence and weapons offences is sparse<sup>10</sup> but the subject raises important questions about the connection between the defence and this specific category of offences.

As already mentioned, the dynamic between self-defence and weapons offences is one of the central themes of this study and it is also one of the main claims of originality. The thesis considers this relationship in detail, highlighting the complications that exist in this area of law, and considering the need for greater clarity on the defences that should apply and the permissibility of assessing fear

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<sup>8</sup> For example, F.Leverick *Killing in Self-defence*, (Oxford University Press, Oxford, 2006); and S.Uniacke *Permissible Killing: The Self-Defence Justification of Homicide*, (Cambridge University Press, Cambridge, 1994).

<sup>9</sup> For example, see J.J.Thomson 'Self-Defense' (1991) 20(4) *Philosophy and Public Affairs* 283.

<sup>10</sup> However, see Lanham's article for a direct exploration of this relationship: D.Lanham 'Offensive Weapons and Self-defence' (2005) *Criminal Law Review* 85.

within the construction of a defence.<sup>11</sup> The thesis highlights in particular the apparent disconnect between weapons offences and self-defence. This can be stated as an uncertain area within the law, with conflicting interpretations arising from the case law on the suitability of the defence for such offences. The thesis therefore offers an original contribution in its combination of the exploration of self-defence and offensive weapons alongside each other.

The second claim relates to the amendments made by the Crime and Courts Act 2013 in respect of the creation of a 'householder' form of self-defence. The law will be clarified in Chapter 2, (which assesses the general position), and Chapter 4 (which explains the householder provision). The thesis is critical of the disparity between locations in self-defence, namely the different approaches applied depending on whether a person is in a public place or in a private dwelling. As the law has recently been changed to permit greater protection for householders, the research traces and questions this change, analysing the implications in connection with the proposed reasons for reform.

As this distinction is a relatively new feature of the law, this change is an emerging field of academic discussion,<sup>12</sup> especially with regard to the element of location. This is the other central theme of this research and is a significant part of the original contribution made by the study. The thesis looks beyond the discipline of law in order to understand deeper sociological and criminological aspects of location, to question the very fabric of the home and what in particular separates perceptions of public and private places. This research adds an interesting dimension to the legal debate as it considers individual and social constructs of home, and the emotional attachments that are formed towards one's home and their power to influence behaviour, and connects these considerations to the law of self-defence and weapons offences.<sup>13</sup>

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<sup>11</sup> See Chapter 3 for discussion. The law in relation to offensive weapons and bladed articles is explained at section 3.2, while the specific statutory defences of reasonable excuse and good reason are set out at section 3.4.

<sup>12</sup> L.Bleasdale-Hill "'Our Home is Our Haven and Refuge – a Place Where we Have Every Right to Feel Safe': Justifying the Use of up to "Grossly Disproportionate Force" in a Place of Residence' (2015) *Criminal Law Review* 407; S.Miller 'Grossly Disproportionate': Home Owners' Legal License to Kill' (2013) 77(4) *The Journal of Criminal Law* 299; and C.Elliott 'Interpreting the Contours of Self-defence within the Boundaries of the Rule of Law, the Common Law and Human Rights' (2015) *The Journal of Criminal Law* 330.

<sup>13</sup> See Chapter 5.

The third and final claim of originality is made in relation to the diversity of the research. The thesis contributes to the existing literature by extending the study into other fields, and draws connections that have not been analysed alongside each other in previous studies. This is evident in the attention paid to the importance of location, the relevance of emotions, and the role of the media within the political framework for legislative change in this field. Despite the perhaps intrinsic connection of fear to self-defence, the emotion is not an essential feature of the defence. Similarly, as fear is an important motivator for weapons possession,<sup>14</sup> it was considered necessary to study emotions in more detail to improve the approach and inform the perspective of this research. The same is true with regard to the relevance of the media, as media representations can be said to influence the public perception regarding the scope of self-defence and the gravity of weapons offences. Again this is a novel enquiry, as the relevance of broader social engagement with the defence, offences, and the role of the media, has not been explored in this way. This medley of topics makes this thesis original, and sets it apart from the existing literature in the field.

## **1.2 The essence and scope of the research**

Many elements arise when considering the scope of self-defence, and this thesis approaches a number of challenges associated with the defence. The public perception, or the layman's view of what qualifies as self-defensive action, may vary from those actions that are considered to constitute self-defence in the eyes of the law. It is a challenging subject as it inherently involves the balancing of the defender's right to defend himself<sup>15</sup> against the aggressor's own rights. Most people have a basic understanding of the defence and some knowledge of its principles, and even without being fully aware of the legal standards and requirements of the test, it is a relatively well-known defence.

The criminal law of self-defence recognises that in certain circumstances it is acceptable to cause harm or even to kill another person in order to protect oneself

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<sup>14</sup> This will become evident during the discussion on the subject in Chapter 3.

<sup>15</sup> For the duration of this research, any reference to the masculine personal pronoun 'him' is intended also to include 'her', unless featuring in relation to the facts of a particular case that is examined.

against their aggression. This statement suggests that it is a simple, straightforward matter. However, the lines formulating the boundaries of the defence are not always clearly defined. There are many situations that present a challenge for the defence, or rather, for those attempting to rely on the defence. It is beyond the scope of this thesis to discuss all the various problematic contexts that have arisen. It should be noted at the outset that issues relating to victims of domestic abuse will not be explored in this study, although it is acknowledged that the topic raises important questions and a host of complex issues. The literature critiquing the treatment of such individuals and the obstacles that the tests of self-defence present to them is extensive, and has been a topic of debate for many years.<sup>16</sup> As this research is primarily focused upon the central themes of self-defence as a defence to weapons offences and the different approaches to location, this particular issue falls outside the scope of the present study.

Accordingly, the complex relationship between the right to self-defence and the legal prohibition in England and Wales on carrying offensive weapons is one of the principal challenges explored in this thesis. This topic merits detailed attention, as although there is extensive literature addressing various aspects of self-defence, few have explored the connection with offensive weapons - though it is often referred to in passing. Most people would accept that there is a general right to self-defence in the law of England and Wales, but this right becomes questionable when weapons are

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<sup>16</sup> Examples of the academic debates on this topic include: F.Leverick *Killing in Self-defence* *op cit* fn 8 at 89-93; S.S.M.Edwards 'Abolishing Provocation and Reframing Self-defence – the Law Commission's Options for Reform' (2004) *Criminal Law Review* 181, at 181; D.Ormerod *Smith and Hogan's Criminal Law*, (13th edn, Oxford University Press, Oxford, 2011), at 390-391; S.S.M.Edwards 'Anger and Fear as Justifiable Preludes for Loss of Self-Control' (2010) 74 *The Journal of Criminal Law* 223, at 241; O.Bakircioglu 'The Contours of the Right to Self-defence: Is the Requirement of Imminence Merely a Translator for the Concept of Necessity?' (2008) 72 *The Journal of Criminal Law* 131, at 131 and 164; J.Dressler 'Battered Women Who Kill Their Sleeping Tormentors: Reflections on Maintaining Respect for Human Life While Killing Moral Monsters' in S.Shute & A.P.Simester *Criminal Law Theory: Doctrines of the General Part*, (Oxford University Press, Oxford, 2002), at 261; C.L.Carpenter 'Of the Enemy Within, the Castle Doctrine, and Self-defence', (2003) 86(4) *Marquette Law Review* 653, at 657; M.A.Franks 'Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women's Syndrome, and Violence as Male Privilege' (2013-2014) 68 *University of Miami Law Review* 1099; J.Herring 'The Meaning of Domestic Violence: *Yemshaw v London Borough of Hounslow* [2011] UKSC 3' (2011) 33(3) *Journal of Social Welfare and Family Law* 297; A.D.Brosius 'An Iowa Law in Need of Imminent Change: Redefining the Temporal Proximity of Force to Account for Victims of Intimate Partner Violence Who Kill in Non-Confrontational Self-Defense' (2014-2015) 100 *Iowa Law Review* 775; S.S.M.Edwards 'Loss of Self-Control: When His Anger is Worth More than Her Fear' in A.Reed & M.Bohlender (eds) *Loss of Control and Diminished Responsibility: Domestic Comparative and International Perspectives*, (Ashgate Publishing Ltd, Surrey, 2011).

involved, and the matter may be described as a grey area of law. Usually, as self-defence is a morally permissible act, it is not considered wrong to act defensively and perhaps injuring another for the purpose of self-preservation. However, when an individual possesses an offensive weapon *in case* of attack, the line between right and wrong is less clear.

Thus, the research explores the difference between the accepted exception to the rules of morality and criminal law, that of self-defence, and the more contentious act of armouring oneself with a weapon in order to use it in self-defence if the situation arises.<sup>17</sup> Situations of self-defence are contrary to the normal perception of violence as immoral and unacceptable. It is perfectly normal and embedded in human nature, reason and reaction, to attempt to protect oneself against harm. However, the possession and use of offensive weapons for defensive purposes adds an interesting dimension to this research, as this aspect creates further uncertainties regarding what should be considered permissible acts of self-defence.

The law relating to offensive weapons has changed over the years and England and Wales employ a strict approach to such offences.<sup>18</sup> The carrying of weapons is a subject that divides opinion, and there is significant disparity between different jurisdictions worldwide. There is no general standard that may be expected, neither is there a universally agreed approach to the issue of weapons possession.<sup>19</sup> On the contrary, there is a universally acknowledged principle that self-defence may provide protection from criminal liability even when the aggressor's life has been taken.<sup>20</sup> A basic explanation of the defence is offered by Paterson, who states that '*the life of a person is always held inviolable unless the person, either now or prospectively, is posing a deadly or gravely injurious threat to others. Actions that seek to repel or stop such threats may be classified as actions of self-defence*'.<sup>21</sup> Various theories have

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<sup>17</sup> This involves a degree of preparation, which is problematic as it suggests that the defender had time for foresight and the potential to avoid the threat. This is discussed further in Chapter 3.

<sup>18</sup> A.Ashworth & J.Horder *Principles of Criminal Law*, (7th edn, Oxford University Press, Oxford, 2013), at 333.

<sup>19</sup> For example, as will become evident, the approach in the USA is significantly different to that in operation in England and Wales. See A.Ashworth 'Editorial: Firearms and Justice' (2013) 6 *Criminal Law Review* 447, at 447.

<sup>20</sup> F.Leverick *Killing in Self-defence op cit* fn 8 at 1.

<sup>21</sup> C.Paterson *Assisted Suicide and Euthanasia; A Natural Law Ethics Approach*, (Ashgate Publishing, Hampshire, 2008), at 84.



been advanced as justifications for this state of affairs and their merits and applicability will be explored in Chapter 2.<sup>22</sup>

As will become evident, in terms of the theoretical framework of the research, different theories have been explored as and when appropriate rather than relying on one single conceptual framework throughout the thesis. As Westerman notes '*the legal system performs this double function of both subject-matter and theoretical framework*'.<sup>23</sup> It is therefore necessary to set out the methodology used in this research to address the aims of the thesis.

### **1.3 Methodology**

Due to the broad remit of the research, the methodology has been varied and does not fit neatly into a single category of legal research. Rather, it can be said to draw upon different methods of conducting legal research, with aspects of the research requiring a doctrinal approach while the thesis substantially adopts a socio-legal perspective.

Legal research is often categorised as being doctrinal or non-doctrinal. The doctrinal approach tends to involve the analysis of statutes and judicial decisions, and is primarily library based. While the non-doctrinal approach focuses on law reform, identifying problems with the law, legal theory, or policy,<sup>24</sup> to gain deeper understanding of legal concepts within the broader context in which they operate.

The doctrinal approach is often referred to as 'black-letter law'<sup>25</sup> and primarily involves the collection of primary sources of law as well as secondary sources. This method is adopted in this research as a starting point. The primary sources considered are the relevant statutes and case law relating to self-defence and weapons offences. These materials enable an interpretation of the current legal position to be reached. As Hutchinson states: '*Doctrinal legal research lies at the heart of any lawyer's task*

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<sup>22</sup> See section 2.2.

<sup>23</sup> P.Westerman 'Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law' in M.Van Hoecke (ed) *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline?*, (Hart Publishing, Oxford, 2011), at 87.

<sup>24</sup> I.Dobinson & F.Johns 'Qualitative Legal Research' in M.McConville & W.H.Chui (eds) *Research Methods for Law*, (Edinburgh University Press, Edinburgh, 2007), at 19.

<sup>25</sup> M.McConville & W.H.Chui (eds) *Research Methods for Law*, (Edinburgh University Press, Edinburgh, 2007), at 1.

because it is the research process used to identify, analyse and synthesise the content of law'.<sup>26</sup> This is a necessary step in the investigation as the law must be clearly located and defined before an appreciation of its appropriateness can begin. Additionally, the secondary sources consulted provide scope to deepen the understanding and analysis of the topic. The secondary sources drawn upon in this research are especially broad, ranging from journal articles, governmental publications, textbooks and monographs, to information on institutional websites and the news media.<sup>27</sup>

The exploration of these sources in particular places this research within the broad spectrum of socio-legal research.<sup>28</sup> This term encompasses many varied types of research methods and approaches. Employed within this research it facilitates an exploration of 'law in context'<sup>29</sup> and a discussion of the reasons behind the law reform proposals, questioning the necessity of reform in contrast to the need to clarify existing provisions, highlighting grey areas of law and critique based on the wider social implications and drivers of legal regulation. The research therefore demonstrates the connection and interdependency of doctrinal research and socio-legal research on each other, as each method informs and improves the knowledge that would be gained and viewpoints projected solely by the other.<sup>30</sup>

The methodology has included a diverse range of different sources, from traditional primary legal sources to academic literature across a wide range of disciplines, and also to non-academic materials such as newspaper articles, televised programmes, and websites. This was especially relevant to the understanding of the media portrayal of cases involving self-defence and the reporting of incidents of knife crime.<sup>31</sup> Engagement with varied resources was necessary due to the nature of the research and to gain a fuller picture and a deeper understanding of the context of the research.

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<sup>26</sup> T.Hutchinson 'Doctrinal Research: Researching the Jury' in D.Watkins & M.Burton (eds) *Research Methods in Law*, (Routledge, Abingdon, 2013), at 9.

<sup>27</sup> C.Chatterjee *Methods of Research in Law*, (Old Bailey Press Ltd, Kent, 1997), at 23.

<sup>28</sup> I.Dobinson & F.Johns 'Qualitative Legal Research' in M.McConville & W.H.Chui (eds) *Research Methods for Law*, *op cit* fn 24 at 20; F.Cownie & A.Bradney 'Socio-legal Studies: A Challenge to the Doctrinal Approach' in D.Watkins & M.Burton (eds) *Research Methods in Law*, (Routledge Abingdon, 2013), at 35 and 47.

<sup>29</sup> M.McConville & W.H.Chui (eds) *Research Methods for Law*, *op cit* fn 25, at 1.

<sup>30</sup> F.Cownie & A.Bradney 'Socio-legal Studies: A Challenge to the Doctrinal Approach', *op cit* fn 28 at 47.

<sup>31</sup> As can be seen in Chapters 3 and 6.

It may therefore be said that a qualitative approach to the analysis of documents is applied in this thesis. According to Walliman, qualitative research is based upon information that is expressed in words,<sup>32</sup> as opposed to the opposite approach in quantitative research which has a greater numerical emphasis.<sup>33</sup> Qualitative research tends to examine aspects of social life such as ‘*the background, interests and broader social perceptions*’<sup>34</sup> of a specific topic. It lends itself well to research within the field of law and this project in particular, as it permits a research question to be formed at the beginning, but facilitates its evolution during the process of collection and analysis of data. This flexibility enables fluidity and freedom to adapt views during the research process as knowledge and awareness increases.<sup>35</sup>

Qualitative methods involve the collection of texts and documents and their analysis and interpretation, thus the focus is upon written sources of information.<sup>36</sup> This method is appropriate to legal research and this study as it provides an unobtrusive way of seeking the answers to the research questions. This method is unobtrusive as it entails the collection of data that is already publicly available (such as case reports; statutes; Parliamentary debates; and published articles), omitting the need to involve members of the public, or representatives of institutions personally (as there may be if interviews or focus groups were used as part of the data collection process). This research benefits from the accessibility of the type of data required for collection, which is a consideration for research design.<sup>37</sup> Some of these resources were already available before the research project commenced, and through the process of collection, selection and interpretation, the documents become data.<sup>38</sup>

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<sup>32</sup> N.Walliman *Social Research Methods*, (Sage Publications, London, 2006), at 124.

<sup>33</sup> I.Dobinson & F.Johns ‘Qualitative Legal Research’ in M.McConville & W.H.Chui (eds) *Research Methods for Law*, *op cit* fn 24 at 17.

<sup>34</sup> A.Holliday *Doing and Writing Qualitative Research*, (2nd edn, Sage Publications, London, 2007), at 5.

<sup>35</sup> L.Richards *Handling Qualitative Data: A Practical Guide*, (2nd edn, Sage Publications, London, 2010), at 11.

<sup>36</sup> N.Walliman *Social Research Methods*, *op cit* fn 32 at 131.

<sup>37</sup> C.Chatterjee *Methods of Research in Law*, *op cit* fn 27 at 17; J.Hage ‘The Method of a Truly Normative Legal Science’ in M.Van Hoecke (ed) *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline?*, (Hart Publishing, Oxford, 2011) at 22; and M.Burton ‘Doing Empirical Research: Exploring the Decision-making of Magistrates and Juries’ in D.Watkins & M.Burton (eds) *Research Methods in Law*, (Routledge, Abingdon, 2013), at 55.

<sup>38</sup> L.Richards *Handling Qualitative Data: A Practical Guide*, *op cit* fn 35 at 46/47.

The terms that best describe this research method are textual analysis or documentary methods, which represent a critical approach to the analysis of documents. These methods involve the detailed examination of documents,<sup>39</sup> and Jupp states that with textual analysis *‘the emphasis is less on the amount and frequency of occurrences and more on interpreting the meaning the document might have.’*<sup>40</sup> This refers to the view that these methods are to be regarded as qualitative content analysis.<sup>41</sup> Rather than considering the frequency that a particular topic arises within the text as with quantitative content analysis, the focus is instead on the ideas and meanings within the document, and the ‘characteristics of the content’.<sup>42</sup> This approach is well-suited to legal study generally, and to the aims of this research project, which is intrinsically concerned with the interpretation of different texts.<sup>43</sup>

This method is easily adaptable to the analysis of legal statutes and cases as it provides a method for detecting how the legislator’s intentions are applied and interpreted in practice by the courts and within the criminal justice system. Chatterjee highlights that this is a method which also facilitates the analysis of materials such as newspapers and Parliamentary debates, which assists in reaching an understanding of the motivations of law reform and the messages targeted towards informing public perception.<sup>44</sup> According to Bloor and Wood, *‘researchers who use this approach may use discourse analysis to examine the role of official documents and how they regulate society.’*<sup>45</sup> Discourse analysis is described as *‘a qualitative method of ‘reading’ texts, conversations and documents which explores the connections between language, communication, knowledge, power and social practices,’*<sup>46</sup> focusing on their meaning and structure. Therefore, both textual analysis/documentary methods and discourse analysis are useful methods for understanding the effect and effectiveness of legislation relating to offensive weapons and self-defence in this study. This is especially pertinent when referring to court judgements in individually

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<sup>39</sup> V.Jupp *The Sage Dictionary of Social Research Methods*, (Sage Publications, London, 2006), at 79.

<sup>40</sup> *ibid*, at 80.

<sup>41</sup> A.Bryman *Social Research Methods*, (3rd edn, Oxford University Press, Oxford, 2008), at 529.

<sup>42</sup> V.Jupp *The Sage Dictionary of Social Research Methods*, *op cit* fn 39 at 41.

<sup>43</sup> M.Van Hoecke ‘Legal Doctrine: Which Method(s) for What Kind of Discipline?’ in Van Hoecke, M. (ed) *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline?*, (Hart Publishing, Oxford, 2011), at 4.

<sup>44</sup> C.Chatterjee *Methods of Research in Law*, *op cit* fn 27 at 42.

<sup>45</sup> M.Bloor & F.Wood *Keywords in Qualitative Methods - A Vocabulary of Research Concepts*, (Sage Publications, London, 2006), at 58-59.

<sup>46</sup> V.Jupp *The Sage Dictionary of Social Research Methods*, *op cit* fn 39 at 74.

relevant cases, as the judges will only permit the defence of self-defence, especially when offensive weapons are involved, in so far as it does not encroach on the intention of Parliament in drafting the relevant statutes, which thus requires careful interpretation.

The advantage of employing this method is that the existing literature in the field is placed at the forefront of the research enquiry and provides context knowledge.<sup>47</sup> When research is reliant on documentary methods, care must be taken with regard to the quality of the data being analysed. This caution applies in particular to publications in the press and online news media, as there is a risk that the information provided may be taken out of context in order to deliver the maximum response from the readers. Nevertheless such media are valuable sources as they provide an insight into the public's perception of the law in the area, and can play a crucial role in demands for law reform.<sup>48</sup> Another informative source is the secondary analysis of official statistics to detect whether the laws are effective in practice from examining the statistical data on crime rates.<sup>49</sup> Official statistics and media representation, primarily in the press and online news media, can provide significant insight into the social phenomena, as they consider the general awareness and public perception of the law in conjunction with the evidence available to see whether there is a consensus about the extent of the situation.<sup>50</sup>

It is clear that this research has benefitted from a combination of methodologies, most notably the approaches of doctrinal legal research and socio-legal research. It has considered a wide breadth of sources in order to engage with the aims of the research and the various disciplines that have informed the perspective of this study. As the methodology has now been outlined, it is imperative that important elements which influence the scope of this research are clarified.

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<sup>47</sup> This approach may be considered to adopt the principles of theoretical sampling, where one starts with a document or text that seems interesting and relevant to the research, and proceeds to build literature from there. U.Flick *An Introduction to Qualitative Research*, (3rd edn, Sage Publications, London, 2006), at 267.

<sup>48</sup> J.Knowles *Effective Legal Research*, (3rd edn, Sweet & Maxwell, London, 2012), at 95.

<sup>49</sup> This incorporates elements of a quantitative investigation into the study.

<sup>50</sup> The comparison of findings generated by different research methods and resources on the same topic is an example of triangulation, which Bryman describes as providing 'greater validity' through the combination of quantitative and qualitative research. A.Bryman *Social Research Methods*, *op cit* fn 41 at 608.

Many factors can influence the justification of self-defence, and it is necessary to explain the interpretation for the purposes of this research of two such factors at the outset of the thesis. The first relates to the degree of harm that may be caused in self-defence, whether it is lethal or non-lethal; and the second relates to the distinction between justification and excuse.<sup>51</sup>

## **1.4 Preliminary explanations**

### **1.4.1 Death as the ultimate harm and lesser harms**

In the interest of clarity, it should be explained at the outset that this research will not be limited only to a discussion of cases resulting in killing in self-defence; it will also encompass lesser harms than death which occur as a consequence of using defensive force. Much of the existing literature has focused on acts of killing in self-defence and has attempted to provide justifications for this outcome, such as Leverick and Uniacke's monographs,<sup>52</sup> and articles by Kasachkoff<sup>53</sup> and Quong.<sup>54</sup> Killing in self-defence is arguably the most controversial element in the debate on the defence and is the most serious outcome possible from self-defensive actions.<sup>55</sup> Accordingly, this has fuelled most of the academic debate on the subject. This is the most morally troubling and criminally grave result of the defence, and is also the moral wrong and crime that attracts the greatest need for proof of justifying circumstances and individual accountability.<sup>56</sup> Young classifies self-defence as an example of a morally justifiable

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<sup>51</sup> For an explanation of this distinction, see section 1.4.2.

<sup>52</sup> F.Leverick *Killing in Self-defence*, *op cit* fn 8; S.Uniacke *Permissible Killing: The Self-Defence Justification of Homicide* *op cit* fn 8.

<sup>53</sup> T.Kasachkoff 'Killing in Self-Defense: An Unquestionable or Problematic Defense?' (1998) 17(5/6) *Law and Philosophy* 509.

<sup>54</sup> J.Quong 'Killing in Self-defense' (2009) 119(3) *Ethics* 507, at 509.

<sup>55</sup> It is assumed that to cause a person's death, to murder, must surely be the most severe harm possible to inflict on another. However, despite varying belief systems about the afterlife, there is no conclusive evidence that death is a bad thing; indeed for some sufferers of degenerative, painful, terminal illnesses it may even be a good and welcome outcome. A valuable discussion on the harm of death is provided in J.McMahan 'Death and the Value of Life' (1988) 99(1) *Ethics* 32, at 42. Williams discusses this in relation to the compassionate crime of assisted suicide, questioning the role of punishment for a consensual, one-off incident which poses no risk to the public. G.Williams 'Assisting Suicide, the Code for Crown Prosecutors and the DPP's Discretion' (2010) 39 *Common Law World Review* 181, at 201-202. See also A.P.Simester & A.von Hirsch *Crimes, Harms, and Wrongs: On the Principles of Criminalisation*, (Hart Publishing, Oxford, 2014), at 168-171.

<sup>56</sup> As evident in Wallerstein's article, where he notes that the final point along the harm scale, where fatal injuries occur, is where the most conflict arises for the underlying theories and justifications.

killing.<sup>57</sup> However, not all cases involving defensive action will result in a fatal injury. Therefore, while his view is not contested in this study, it is considered preferable to regard the defence as being a morally sound action in the prevention of any personal harm, and not only lethal harm.

Feinberg's research is instructive on what is considered to be the definition of 'harm', which according to him entails the setting back of an interest. When an interest is interfered with, it harms its holder, causing a deterioration of his situation, a worsening of his position.<sup>58</sup> There are many types of interests that fall subject to the harm principle, including the interests of bodily integrity and autonomy, property interests and privacy.<sup>59</sup> All of these will be discussed to varying degrees in this thesis, as interests meriting self-defensive action when they are threatened. The extent to which the defence is available relies on the nature of the interest protected, with personal interests given greater credence than rights of ownership. Within the context of self-defence, usually the defender will be reacting to a threat to his life or the life of another, or at least will be fearful for his life. To lose one's life or suffer a physical injury would certainly constitute the setting back of one's interests and a harm.<sup>60</sup>

Most references to fatal self-defence also apply to non-fatal outcomes, so the standard required by the law is generally the same. However, it may be applied more narrowly depending on the gravity of the offence. For example, a person claiming self-defence to an offence of causing actual bodily harm may be able to plead that his action was reasonable with slightly more ease than one who is accused of murder, as the threshold to be reached may be higher in the latter. Thus, it is in the interest of minimizing any possible omissions and restrictions in terms of the offences that self-defence applies to, that this study includes a consideration of lesser harms that result from non-fatal self-defence.

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Although he focused upon killing as the result of defensive force, he expressly stated that his research was also intended to apply to less grave defensive force. S.Wallerstein 'Justifying the Right to Self-Defense: A Theory of Forced Consequences' (2005) 91 *Virginia Law Review* 999, at 1001.

<sup>57</sup> R.Young 'What is so Wrong with Killing People?' (1979) 54 *Philosophy* 515, at 515.

<sup>58</sup> J.Feinberg *Harm to Others: The Moral Limits of the Criminal Law*, (Oxford University Press Oxford, 1987), at 53.

<sup>59</sup> *ibid* at 61.

<sup>60</sup> Uniacke adds that it is not only the harm caused that is relevant, but also the wrong suffered. The wrong would only be produced if the harm is caused in an unjust manner. S.Uniacke 'Proportionality and Self-defense' (2011) 30 *Law and Philosophy* 253, at 260.

This is most important in relation to the consideration of offences involving the possession and use of offensive weapons. Such actions do not always produce fatal results, as they often involve minor injuries or mere threats. Therefore, the nature of this research requires a broader application and understanding of self-defence. Sangero argues that limiting a justification of self-defence to instances which result in death is problematic,

*‘the restriction of the discussion of private defence to homicide offenses alone, so prevalent in the literature, is both mistaken and misleading – mistaken because private defence applies also to other offenses, such as simple assault, and misleading because concentrating solely on situations of ‘a life for a life’ distorts the picture’.*<sup>61</sup>

Leverick in particular has been scrutinised for her ‘narrow’ examination of the defence, for only considering cases of killing in self-defence.<sup>62</sup> Due to her claim that the rights theory is the principal justificatory theory of self-defence, and the significant reliance therein on the right to life, it is difficult to transfer her approach across to lesser harms than death.<sup>63</sup> Critics have stated that *‘A theory of self-defense should have explanatory power beyond killing to prevent being killed ... It is widely implausible that one would need a different theory for not killing in self-defense than one needs for killing in self-defense’*.<sup>64</sup> This view is convincing, and has influenced the decision taken in this research not to place limitations on the application of the defence. Thus, lesser harms than death, which occur as a result of self-defence will also be considered.

The second factor, mentioned earlier is that the way in which the defensive harm that ensues is generally perceived depends on whether the defence is considered to provide a justification or an excuse. It is necessary to define the distinction from the outset, as it will surface regularly throughout the thesis.

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<sup>61</sup> B.Sangero ‘A New Defense for Self-Defence’ (2006) 9(2) *Buffalo Criminal Law Review* 475, at 483-484.

<sup>62</sup> F.Leverick *Killing in Self-defence*, *op cit* fn 8.

<sup>63</sup> A.Grabczynska & K.K.Ferzan ‘Book Review: Justifying Killing in Self-Defence’ (2008-2009) 99(1) *The Journal of Criminal Law and Criminology* 235, at 250. This is discussed in section 1.4.1 of the present chapter.

<sup>64</sup> *ibid* at 252.



### 1.4.2 Justification and Excuse

Before embarking on this study, it is necessary to highlight an important distinction between criminal defences, namely, the classification of defences as either justificatory or excusatory.<sup>65</sup> This distinction is often drawn within criminal law theory, and its implications for the moral standing of an act must be understood, although it is not substantially incorporated into the law.<sup>66</sup>

According to the mainstream distinction of justification and excuse, self-defence falls into the category of justification defences. Leverick offers the following explanation of the distinction:

*‘the accused who claims a justification asserts that what she did was, all things considered, an acceptable thing to do, even though it satisfied the definition of an offence. The accused claiming an excuse asserts that, although what she did was unacceptable, there is a reason why she should not be blamed for it’.*<sup>67</sup>

Accordingly, it may be said that a justification determines that the defendant’s conduct under the circumstances is not criminally wrongful, while an excuse states that although the conduct is criminally wrongful, the defendant is not criminally blameworthy for the actions taken.<sup>68</sup>

Greenawalt states that *‘the central distinction between justification and excuse is between warranted and unwarranted action for which the actor is not to blame’*,<sup>69</sup> the justification defence being warranted and the excuse being unwarranted in this respect. This has led to what Funk considers to be the orthodox opinion that justifications focus on the act, the individual’s conduct, while excuses centre on the

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<sup>65</sup> There is some dispute about the acceptance of this distinction, as will become evident during the discussions in this section.

<sup>66</sup> J.Dressler ‘Battered Women Who Kill Their Sleeping Tormentors: Reflections on Maintaining Respect for Human Life While Killing Moral Monsters’, *op cit* fn 16 at 262.

<sup>67</sup> F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 17.

<sup>68</sup> D.N.Husak ‘Partial Defences’ (1998) 11 *Canadian Journal of Law and Jurisprudence* 167, at 170; B.McSherry ‘Criminal Responsibility, “Fleeting” States of Mental Impairment’ (2004) 27 *International Journal of Law and Psychiatry* 445, at 453.

<sup>69</sup> K.Greenawalt ‘The Perplexing Borders of Justification and Excuse’ (1984) 84(8) *Columbia Law Review* 1897, at 1927.

actor.<sup>70</sup> He indicates that while justifications create ‘*exceptions to the prohibitory norms*’, these norms are unaffected by excuses, which instead ‘*exempt certain people from punishment*’.<sup>71</sup>

It may therefore be deduced that a justificatory defence is preferable in terms of moral judgement<sup>72</sup> and stigma as ‘*it is an act without moral flaw*’.<sup>73</sup> Acts of self-defence are not merely excused; they are justified and morally acceptable.<sup>74</sup> While excuses can be described, as ‘individual or subjective’, justifications on the other hand are ‘general or objective’,<sup>75</sup> arguably meaning that they are less dependent on the people involved and more focused on the circumstances,<sup>76</sup> which are more universally applicable. A successful plea of self-defence allows defendants to admit their wrongdoing, but at the same time claim it was justifiable in the circumstances, thereby offering a defence for the actions taken, holding it not wrongful and a lawful conduct in the particular context.<sup>77</sup>

It is worth noting that this is, to an extent, a paradoxical conclusion, because if an action is justified and ‘right’ it should not need a defence. Despite the fact that the injury to an aggressor can be explained and that it is not wrongful within the circumstances, an injury has nevertheless been caused. Without the explanation by way of the defence, the conduct would be unlawful. Consequently, the conditions that must be present for self-defence to be permissible must be applied strictly, to ensure that innocent people are not injured unnecessarily. The nature of a justification inevitably concludes that the aggressor’s life has become of less value to society than

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<sup>70</sup> T.M.Funk ‘Justifying Justifications’ (1999) 19(4) *Oxford Journal of Legal Studies* 630, at 633. See also Fletcher, who states that ‘A justification speaks to the rightness of an act; and excuse, to whether the actor is accountable for a concededly wrongful act’. G.P.Fletcher *Rethinking Criminal Law*, (Little, Brown and Company, Boston, 1978), at 759.

<sup>71</sup> T.M.Funk ‘Justifying Justifications’ *ibid.*

<sup>72</sup> D.Husak ‘A Liberal Theory of Excuses’ (2005-2006) 3 *Ohio State Journal of Criminal Law* 287, at 289 and 297; D.Husak ‘On the Supposed Priority of Justification to Excuse’ (2005) 24(6) *Law and Philosophy* 557, at 561.

<sup>73</sup> B.Sangero *Self-Defence in Criminal Law*, (Hart Publishing, Oxford, 2006), at 90.

<sup>74</sup> M.N.Berman ‘Justification and Excuse, Law and Morality’ (2003) 53(1) *Duke Law Journal* 1, at 4.

<sup>75</sup> K.Greenawalt ‘The Perplexing Borders of Justification and Excuse’, *op cit* fn 69 at 1900.

<sup>76</sup> A clear example of the individual component in excuses is the defence of insanity. M.Baron ‘Excuses, Excuses’ (2007) 1 *Criminal Law and Philosophy* 21, at 23. Baron’s paper makes an interesting contribution to the debate on the divergence between justifications and excuse. Concentrating primarily on excuses, she contextualises the concept within everyday situations, providing examples from outside the direct applicability of the criminal law (at 25).

<sup>77</sup> R.Card *Card, Cross & Jones Criminal Law*, (21st edn, Oxford University Press, Oxford, 2014), at 661.

the defender's life, and care must be taken when reaching such perplexing decisions.<sup>78</sup> Leverick claims that the justification and excuse distinction provides moral clarity within the criminal law, as it is essential for the law to express why punishment is necessary and the reasons why one might be absolved from punishment.<sup>79</sup> This is certainly true with regard to the ability to explain why actions are acceptable and not wrongful in specific circumstances.

Although Colvin believes that criminal law would be better placed without the distinction,<sup>80</sup> and Greenawalt claims that the '*criminal law should not attempt to distinguish between justification and excuse in a fully systematic way*',<sup>81</sup> it is morally and legally significant in terms of its impact on the defendant's liability for the offence committed. Colvin argues that a better distinction would be possible if the criminal law separated the different types of defences as '*defences of contextual permission and defences of mental impairment*'.<sup>82</sup> The first would cover those acts that are acceptable, while the latter would address situations where the individual concerned is not a proper subject of the criminal law. This is a potentially viable suggestion as it would provide clarity on the separation of defences according to their nature. Moreover, further academic opinion cast doubt on the distinctions' importance. For example, Fletcher states that while the distinction was significant to Blackstone, it no longer has the same significance, and '*only those common law theorists who read and respect the philosophical literature have high regard for the distinction*'.<sup>83</sup> While this may be true, the general consensus supports the distinction which is widely used and accepted by academics,<sup>84</sup> although seldom used in practice by judges.<sup>85</sup>

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<sup>78</sup> J.Slater 'Making Sense of Self-Defence' (1996) 5 *Nottingham Law Journal* 140, at 153.

<sup>79</sup> F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 41.

<sup>80</sup> E.Colvin 'Exculpatory Defences in Criminal Law' (1990) 10 *Oxford Journal of Legal Studies* 381, at 382.

<sup>81</sup> K.Greenawalt 'The Perplexing Borders of Justification and Excuse', *op cit* fn 69 at 1898.

<sup>82</sup> E.Colvin, *op cit* fn 80 at 383.

<sup>83</sup> G.P.Fletcher 'The Right and the Reasonable' (1984-1985) 98 *Harvard Law Review* 949, at 954.

<sup>84</sup> D.Husak 'On the Supposed Priority of Justification to Excuse', *op cit* fn 72 at 561.

<sup>85</sup> P.Westen & J.Mangiafico 'The Criminal Defense of Duress: A Justification, Not an Excuse - and why it Matters' (2003) 6(2) *Buffalo Criminal Law Review* 833, at 833-834.

For example, in *Re A (Children)*<sup>86</sup> the necessity defence was used to grant permission to surgeons to separate conjoined twins, knowing that while the operation would save the stronger twin, Jodie, it would kill her weaker sister, Mary. The case provides an example where the distinction of justification and excuse was implicit in Brooke LJ's judgement. This was so despite his statement that '*English criminal law does not make any clear-cut distinction between a justification and an excuse*'.<sup>87</sup> Kugler notes that despite evidence of an awareness of the distinction in the judgement, and an apparent application of necessity as a justification, there were occasions where the language pertained to excuse.<sup>88</sup> Williams's analysis illuminates this as she discusses the necessity test that was laid down in the case, and explains that the decision to include a proportionality requirement indicates reliance upon utilitarian reasoning.<sup>89</sup> As such, she notes that the utilitarian concept of choosing the lesser of two evils is regarded as a justification.<sup>90</sup> Thus, upon this understanding, the judgement can be interpreted as employing a justification and not an excuse. Therefore, although judges may not specifically identify, highlight or adhere to the distinction, it nevertheless provides the theoretical foundations for the approach taken in judgements. It is accordingly an important construct and engages a valuable role within criminal law theory.

As the scope and aims of this study have now been defined and preliminary distinctions have been explained, it is necessary to outline the structural content of the thesis. The five substantive chapters focus on individual aspects relating to self-defence, yet are intertwined together to reflect the different challenges of the law in this area.

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<sup>86</sup> *Re A (Children) (Conjoined Twins: Surgical Separation)* [2000] 4 All ER 961; [2001] Fam 147.

<sup>87</sup> *ibid* per Brooke LJ at 237. This approach was supported in the case by Robert Walker LJ at 253. He expressed that it did not matter how defences were classified, the circumstances of the case would be the practical determinant.

<sup>88</sup> I.Kugler 'Necessity as a Justification in *Re A (Children)*' (2004) 68 *Journal of Criminal Law* 440, at 450.

<sup>89</sup> G.Williams 'Necessity: Duress of Circumstances or Moral Involuntariness?' (2014) 43 *Common Law World Review* 1, at 2.

<sup>90</sup> *ibid*. Additionally, Thomson has written extensively on the ethics of killing one person to save several lives. She created the hypothetical 'trolley problem' (which has been used and modified by many other academics since) to provide a practical context for allowing certain killings when faced with certain threats. See for example, J.J.Thomson 'The Trolley Problem' in S.M.Cahn & P.Markie *Ethics: History, Theory and Contemporary Issues*, (3rd edn, Oxford University Press, New York, 2006), at 867. For a conflicting view of the relevance of numbers, and the rejection therefore of the lesser of two evils reasoning, see J.M.Taurek 'Should the Numbers Count?' at 844-856, also in the same edited book.

## **1.5 The structure of the thesis and outline of chapters**

Chapter 2 sets out the defence of self-defence. It will explain the general operation of the law as well as the criteria that must be fulfilled in order to successfully plead the defence. The word ‘general’ is included here as there are two separate tests of self-defence in operation in England and Wales. This chapter discusses the position as it relates to the majority of situations, while Chapter 4 explores the position in relation to householders. This chapter has a strong theoretical dimension, and assesses the varying theories that have been developed to justify self-defence. It will also evaluate the objective standard of the reasonable person, which is applied to those seeking to rely on the defence. The relevance of the defender’s and the aggressor’s characteristics will be introduced, with a consideration of whether the aggressor is culpable or innocent. The individual’s characteristics may be relevant to the overall assessment of self-defensive action, as it may explain why certain individuals are more likely than others to resort to weapons.

Chapter 3 investigates the law concerning offensive weapons and bladed articles, setting out the research context first before considering the legal aspects. It considers the importance ascribed to the nature of the weapon or article concerned, and the statutory defences that are available against a charge of possession. Offensive weapons present a particular challenge to the defence in respect of the admissibility of actions taken prior to a situation of self-defence, as a matter of pre-emption or preparation. It explores whether or not self-defence is a potential defence. Notably, whether a weapon is used or merely possessed has a significant bearing on the applicability of self-defence. Similarly, by pre-emptively carrying a weapon, the defender is partly responsible for the circumstances that ensue. Therefore, the impact of the individual’s own contribution, as an instance of self-generated self-defence is considered.<sup>91</sup> This chapter also explores both legal and non-legal proposals to address the issues of weapons carrying. It discusses the initiatives that have been established with a view to reducing the prevalence of such crimes, and to change the belief that the possession of weapons is required as a matter of self-defence.

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<sup>91</sup> The term ‘self-generated self-defence’ is borrowed from Leverick, in F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 109.

Chapter 4 identifies the two separate tests that exist based on location, as the law differs in the specific context of homeowners, compared to that of general self-defence. The chapter explores this difference, focusing upon the recent change in the law in the context of householder cases. It analyses the debate that ensued before the passing of the Crime and Courts Bill 2013, as well as the arguments supporting and opposing the amendments to the law with regard to householders. In this respect, it is closely connected with Chapter 5, which explores the issue of location. It will also clarify the relevance and role of location in the law relating to offensive weapons, as the relationship between self-defence and these offences is a key feature of the thesis.

Chapter 5 evaluates the impact of location upon the defence of self-defence. It explores the reasons why the law was amended in the context of householders. The issue of retreat before using force in self-defence is considered, and a number of theories such as the castle doctrine are examined to question the special status of the home. The chapter also explores the relevance of criminological insights to further appreciate the different legal positions based on location within a broader context. These provide a context for example, to fear of crime patterns in respect of private and public places, the opportunity for crime, and the use of public places by young people.

Chapter 6 surveys two distinct areas that may influence the law regarding self-defence and offensive weapons. The first topic discussed is the role of emotions as triggering factors behind the carrying of weapons or recourse to self-defensive action, and whether these should be permissible considerations by law. While the primary emotion discussed is fear, other emotions may also be involved, particularly in relation to the use and possession of weapons. The second topic considered is the media, as this has played a vital role in the sensationalising of weapons offences,<sup>92</sup> as well as being a driving force behind the changes to the law of self-defence. This aspect is approached by highlighting the public's fascination with crime, and the techniques used by the media to attract attention and create an impact before discussing media effects in respect of knife crime and self-defence.

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<sup>92</sup> See for example the following sensationalist headline: B. Leapman '400 Victims of Knife Crimes Each Week' (*The Telegraph*, 28 October 2007), <http://www.telegraph.co.uk/news/uknews/1567594/400-victims-of-knife-crimes-each-week.html> (accessed on 05/10/11).

Chapter 7 concludes the thesis and makes original contributions to the existing literature in the field, by offering a new perspective on several dimensions of self-defence. The examination of the relationship between self-defence, offensive weapons, location, and the relevance of emotions and the media represents a broad exploration of the boundaries of self-defence, highlighting areas into which the defence should and should not extend.

The following quote aptly summarises the challenges ahead of this research project:

*‘The justification of self-defence is an ancient, yet unsettled, area of criminal law. The defense reflects a tension in our society; we seek to punish those who are morally blameworthy, acquit those who act out of self-preservation, and at the same time to enforce standards of behaviour that prevent the development of a lawless society’.*<sup>93</sup>

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<sup>93</sup> S.Diamond ‘Criminal Law: The Justification of Self-defense’ (1987) *Annual Survey of American Law* 673, at 673.

## **Chapter 2: Self-defence – The ‘General’ Position**

### **2. Introduction**

The criminal law defence of self-defence permits the use of force against an aggressor in certain qualifying circumstances, even if the force proves lethal. It allows individuals to act within their best interests to secure their own safety, by repelling threats or attacks with defensive force. This means that individuals who successfully plead self-defence will not receive punishment for the crime, which ‘but for’ the defence, they will have committed. While self-defence is theoretically a potential defence to all crimes in the law of England and Wales,<sup>94</sup> not all circumstances will justify the defensive action that has been exerted. It is here that the legal definition of the defence is most pivotal, as it is often either unfamiliar to, or misunderstood by lay people.

Thus, the natural starting point and first matter to be addressed in this chapter is the law itself. It is necessary to gain an understanding of the wording and interpretation of the law, and to explore the parameters of the defence before analysing problematic situations. While this chapter focuses upon the general position of the law, Chapter 4 expands upon this by examining the legal position relating to householders, as there are now two different strands of self-defence in operation within the law of England and Wales.

Secondly, the chapter evaluates the various theories advanced in an attempt to explain the justification behind self-defence.<sup>95</sup> Despite the *prima facie* perception that self-defence is a rightful and permissible action,<sup>96</sup> albeit within certain constraints, the underlying foundations that justify the defence are difficult to state conclusively,<sup>97</sup> therefore many different theories have been developed.

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<sup>94</sup> J.Horder ‘Self-defence, Necessity and Duress: Understanding the Relationship’ (1998) 11 *Canadian Journal of Law and Jurisprudence* 143, at 143.

<sup>95</sup> The notion of justification and excuse was discussed in section 1.4.2 of Chapter 1, the introduction.

<sup>96</sup> For example, as Grabczynska and Ferzan state ‘Based on first appearances, one might think that self-defence is easy to justify. A bad guy threatens to kill you, so you kill him. Enough said. However, once one scratches the surface, self-defence becomes far more complicated. Why is it permissible to kill the “bad guy”?’ A.Grabczynska & K.K.Ferzan ‘Book Review: Justifying Killing in Self-Defence’ *op cit* fn 20 at 235. See also F.Leverick *Killing in Self-defence*, *op cit* fn 63 at 43.

<sup>97</sup> H.Frowe *Defensive Killing*, (Oxford University Press, New York, 2014), at 1.



Thirdly, self-defence is largely measured according to an objective test, (although the test also involves a degree of subjective analysis), namely, a test focusing on the reasonable person. This notion will be questioned in its appropriateness for determining reasonableness within the defence. Accordingly, deliberation is given to the appropriateness of the *defender's* individual physical characteristics as permissible considerations, which would require an increased degree of subjectivity within the defence.

Finally, it is necessary to consider the relevance of the *aggressor's* characteristics. This involves an appreciation of whether the aggressor is culpable or innocent, as this significantly influences whether self-defence is permissible or impermissible in the circumstances.

## **2.1 The law of self-defence**

Self-defence is one of the most well established defences available in cases of crimes of violence. It has been available for centuries<sup>98</sup> and is widely accepted as a complete defence in common law jurisdictions.<sup>99</sup> In theory, it is a potential defence to any crime, although in practice, some crimes will certainly fall short of its requirements, and will not meet the criteria that have been developed.<sup>100</sup> Despite the fact that self-defence is often considered not only a defence, but also a right,<sup>101</sup> there are many elements of the defence that are unclear and far from obvious in their application.

Self-defence is a common law defence, which means that the law is to be found in the precedent of case law. Although the law is aptly covered and effectively dealt with by the courts, there are some statutes that overlap, or act as a reinforcement of, or

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<sup>98</sup> For example, as Leverick explains, '*the availability of the defence can be traced back to at least the 1200s*'. F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 1.

<sup>99</sup> Diamond explains that early common law did not include a self-defence provision due to the reluctance to permit a defence that could potentially destabilise society. However, as societal stability increased to a reliable position, the self-defence provision developed, and by 1829 it had been acknowledged as a complete defence in English law. S.Diamond, *op cit* fn 93 at 673.

<sup>100</sup> This will be discovered in relation to offences involving the possession of offensive weapons. The relevant criteria will be set out shortly.

<sup>101</sup> See S.Uniacke *Permissible Killing: The Self-Defence Justification of Homicide*, *op cit* fn 8 at 6.

alternative to the common law. First, the common law position will be addressed, followed by an assessment of the statutory framework.

The common law position in relation to self-defence is explained in simple terms in the case of *R v Martin*,<sup>102</sup> namely that there is a general entitlement for a defendant to use reasonable force in self-protection against unlawful threats and attacks. The question of whether the force used was reasonable in the circumstances is to be considered by the jury, according to the circumstances as the defendant honestly believed them to be at the time of the attack.<sup>103</sup> However, the defence is not unlimited in its scope, as the force will only be reasonable providing it is necessary. This means for example, that if there are alternative options available to the defender other than to use force in self-defence, such as safely retreating, then it will not be reasonable to take forceful action.<sup>104</sup>

It was claimed by their Lordships in the case of *R v Palmer*<sup>105</sup> that the law in this area is simple and easily understood, '*it is a straightforward conception ... Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself*'.<sup>106</sup> Despite this assertion, the topic nevertheless merits detailed attention, as some aspects of the defence can be complex and inconsistencies in the application of the law sometimes occur. Nevertheless, the fundamental principles underpinning the defence are indeed widely comprehensible to lawyers, juries, and (under proper direction) laypeople alike.

As the common law position has been outlined, the discussion must turn to examine the statutory position regarding self-defence. The Criminal Law Act 1967 addresses the prevention of crime, and this Act applies also to cases of self-defence. Section 3 of the Act reads: '*A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or*

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<sup>102</sup> *R v Martin* [2001] ECWA Crim 2245; [2003] QB 1.

<sup>103</sup> The weight attached to the consideration of the defender's own belief was stated and confirmed in the cases of *R v Gladstone Williams* [1987] 3 All ER 411, CA and *R v Beckford* [1987] 3 WLR 611; [1988] AC 130, PC.

<sup>104</sup> The rules relating to retreat will be discussed shortly, but the case of *R v McInnes* [1971] 3 All ER 295, at 300, has proved that retreat is merely a consideration to be taken into account when assessing a case of self-defence, and is not a conclusive factor.

<sup>105</sup> *R v Palmer* [1971] AC 814.

<sup>106</sup> *ibid*, at 831.

*suspected offenders or of persons unlawfully at large*'.<sup>107</sup> Most cases of self-defence will fall under this category, as the action will be taken in the prevention of crime.

It is therefore an important element of self-defence that the defensive action is taken as a response to a criminal or unlawful threat, and is directed towards the aggressor, who creates the need for defensive force.<sup>108</sup> Uniacke highlights the necessity that the defensive action is reacting to the unlawful threats by stating, '*The permissibility of homicide in self-defence is grounded in the fact that the act is one of resisting, repelling, or warding off an unjust immediate threat*'.<sup>109</sup> The same principle applies to non-fatal acts of self-defence. The unlawful force requirement may be posed as a reason for the fundamental difference in approach to the defence of self-defence and those of duress and necessity, where the victim is not posing an unjust threat to the accused.<sup>110</sup> However, there are some cases where the aggressor will not be acting unlawfully, for example, a child under the age of ten who is not criminally liable,<sup>111</sup> or a person who lacks mental capacity.<sup>112</sup> Technically, therefore, in such situations, only the common law defence will be available,<sup>113</sup> as it cannot be said that the force was used in the prevention of crime.

More recently, legislation has shown support for the common law defence, in the form of the Criminal Justice and Immigration Act 2008, and the Legal Aid,

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<sup>107</sup> Section 3 Criminal Law Act 1967.

<sup>108</sup> F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 7.

<sup>109</sup> S.Uniacke *Permissible Killing: The Self-Defence Justification of Homicide*, *op cit* fn 8 at 177.

<sup>110</sup> Contrary to self-defence, the defences of duress and necessity do not provide a defence to murder. There are two types of duress, duress by threats and duress of circumstances. Duress involves either the compulsion by threats upon a person to commit a crime, or the exigency of the circumstances to do so. The case of *R v Howe* (1987) 85 Cr. App. R. 32, at 54, per Lord Griffiths, provides authority that duress is not a defence to murder or attempted murder. Duress of circumstances is similar to necessity, the lesser of two evils defence, where an emergency situation requires action. Although not generally available to murder, exceptional cases such as *Re A (Children)*, *op cit* fn 86, have held the defence permissible. See also Chapter 1, section 1.4.2 for further discussion on this case.

<sup>111</sup> Age is a recognised form of exemption from criminal liability, proclaiming a general lack of capacity for all children below the threshold as set by law. N.Lacey 'Legal Constructions of Crime' in Maguire, M. & Morgan, R. (eds), *The Oxford Handbook of Criminology*, (4th edn, Oxford University Press, Oxford, 2007), at 185.

<sup>112</sup> This matter refers to the discussion of culpable and non-culpable aggressors, discussed in section 2.4 of this chapter, as these individuals fall within the latter category due to their innocence and lack of responsibility for their actions.

<sup>113</sup> It must be noted however, that the standard required for lawful self-defence under both the common law and the statute coexist, and should be applied in the same manner as was decided in *R v Cousins* [1982] 2 W.L.R. 621; [1982] QB 526 (CA), at 530. This means that an assessment of reasonable force will be applied regardless of whether it is the common law defence or statutory prevention of crime defence that is under consideration.

Sentencing and Punishment of Offenders Act 2012.<sup>114</sup> The 2008 Act will be explored first, and following this, the contribution of the 2012 Act will be examined.

Section 76 of the 2008 Act sets out a provision on what amounts to ‘reasonable force for purposes of self-defence’. It states in subsection (1) that the scope of the provision is to clarify the term ‘reasonable force’ in relation to the defences listed in subsection (2), which are the common law defence of self-defence, and the statutory defence of prevention of crime in section 3(1) of the Criminal Law Act 1967. The provisions of section 76 are lengthy, as it progresses to discuss in detail the various considerations that may be taken into account when assessing reasonable force. These are explained in subsection (3), specifically stating that the degree of force used is to be assessed in light of the circumstances as the defender considered them to be at the time. This appears to be a mere restatement of the decisions in the cases of *Williams*<sup>115</sup> and *Beckford*.<sup>116</sup> However, subsection (3) also states that subsections (4) to (8) are relevant to the consideration of reasonable force, (appearing here as originally enacted);<sup>117</sup>

*(4) If D claims to have held a particular belief as regards the existence of any circumstances*

*(a) the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; but*

*(b) if it is determined that D did genuinely hold it, D is entitled to rely on it for the purposes of subsection (3), whether or not*

*(i) it was mistaken, or*

*(ii) (if it was mistaken) the mistake was a reasonable one to have made.*

*(5) But subsection (4)(b) does not enable D to rely on any mistaken belief attributable to intoxication that was voluntarily induced.*<sup>118</sup>

*(6) The degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was disproportionate in those circumstances.*

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<sup>114</sup> Among the intended aims of the Criminal Justice and Immigration Act 2008 is ‘to amend the criminal law’, which is the context in which the ‘reasonable force for purposes of self-defence’ is set.

<sup>115</sup> *R v Gladstone Williams*, *op cit* fn 103.

<sup>116</sup> *R v Beckford*, *op cit* fn 103.

<sup>117</sup> The amendments and additions of subsequent legislation will be discussed later, for reasons of tracing the development of the statutory provisions of the defence.

<sup>118</sup> It should be noted that this subsection was amended by the Crime and Courts Acts 2013, with the insertion of section 5A, providing a different standard within the context of householder cases, where up to ‘grossly disproportionate force’ may be used. This will be discussed in Chapter 4.

*(7) In deciding the question mentioned in subsection (3) the following considerations are to be taken into account (so far as relevant in the circumstances of the case)*

*(a) that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action; and*

*(b) that evidence of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.*

*(8) Subsection (7) is not to be read as preventing other matters from being taken into account where they are relevant to deciding the question mentioned in subsection (3).<sup>119</sup>*

It is clear from the legislation that the principles set out in the common law are accepted. Again, subsection (7) appears to be another restatement of the common law. The case of *Palmer*<sup>120</sup> provided the authority for the consideration that individuals acting in the heat of the moment may not be able to weigh the exact amount of force that is necessary for self-defence, when determining its availability.

Essentially, the provision does no more than reinforce the common law position<sup>121</sup> that the reasonableness of the degree of force used in self-defence will be considered in light of the circumstances as the defendant believed them to be.<sup>122</sup> For this reason, providing the defendant's defensive action constitutes no more than he honestly and instinctively considered to be necessary in the circumstances; that his belief was reasonably held; and represents the only possible choice that was available to him, he will not be prosecuted for the offence he has committed, and which but for the defence, he would be criminally liable for.<sup>123</sup>

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<sup>119</sup> The Criminal Justice and Immigration Act 2008, section 76. There is also a further subsection 8A, which was again inserted by the 2013 Act, which defines a 'householder case'. This will also be analysed in Chapter 4.

<sup>120</sup> *R v Palmer*, *op cit* fn 105.

<sup>121</sup> D.Ormerod & K.Laird *Smith and Hogan's Text, Cases and Materials on Criminal Law*, (11th edn, Oxford University Press, Oxford, 2014), at 414.

<sup>122</sup> The Criminal Justice and Immigration Act 2008, section 76 (3).

<sup>123</sup> The defence can be viewed as recognition that the reasons for acting outweigh those against. Thus, although an offence is committed, there are valid mitigating reasons which justify the conduct. J.Gardner 'Fletcher on Offences and Defences' (2003-2004) 39 *Tulsa Law Review* 817, at 819.

The 2012 Act is a continuation of the attempt to clarify the legal position regarding self-defence, although it adds little to the existing extensive provisions.<sup>124</sup> Section 148 provides a revision to the 2008 Act, although the amendments made are minimal as they merely target accidental omissions from the former Act. Its purpose was to secure the inclusion in subsection (2) of the defence of property within the defence, and the explanation in subsection (3) (with the insertion of subsection (6A)) that the ability to retreat is only a consideration and not a determining factor of the defence,<sup>125</sup> as already stated in the case of *McInnes*.<sup>126</sup> The provision does not contribute new law, but represents another reinforcement of the common law without changing the test for self-defence.

These attempts at clarification have come under fire from critics. Allen criticised the 2008 Act as “*one of the worst examples of gesture politics resulting in pointless legislation ... it simply legislates for what case law had already established*”.<sup>127</sup> This view is a fair deduction, and as the 2012 Act merely amends the 2008 Act, again inserting the principles laid out by the common law into statutory form, it falls subject to the same criticism.<sup>128</sup> However, a more positive interpretation of the provisions is to regard them as a codification of the common law - a development that has been advanced as desirable for many years.<sup>129</sup>

### **2.1.1 The criteria to be met in cases of self-defence**

The key determinant of lawful self-defence is the use of reasonable force. The test of reasonable force is split into two main components that must be satisfied for a plea of

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<sup>124</sup> It is worth noting that section 142 of the Act introduced minimum sentences in respect of offences occurring in public places or on school premises, where a person aged 16 or over is convicted of threatening or endangering others with a knife. This was achieved by introducing section 139A into the Criminal Justice Act 1988.

<sup>125</sup> Legal Aid and Punishment of Offenders Act 2012, section 148.

<sup>126</sup> *R v McInnes*, *op cit* fn 104 at 300.

<sup>127</sup> M.Allen *Textbook on Criminal Law*, (11th edn, Oxford University Press, Oxford, 2011), at 205.

<sup>128</sup> Quick and Wells also observe that listing common law rules in statutory form has dubious value as a clarification of the law. O.Quick & C.Wells ‘Partial Reform of Partial Defences: Developments in England and Wales’ (2012) 45(3) *Australian & New Zealand Journal of Criminology* 337, at 348.

<sup>129</sup> See the Law Commission, *Criminal Law: A Criminal Code for England and Wales*, (2 vols) (Law Com No 177, 1989). The Law Commission is responsible for reviewing and codifying the law. Although a draft Criminal Code was produced in 1989, it was decided that it would be more appropriate to focus on individual areas within the law first, to align them with the requirements of modern society, before producing a complete code. Information about the latest reports is available at <<http://lawcommission.justice.gov.uk/areas/legislating-the-criminal-code.htm>> (accessed on 10/01/15).

self-defence to be successful. The two components are: (i) the existence of the necessity to act, and (ii) the proportionality of the act. These conditions are both moral and legal prerequisites to permissible acts of self-defence. Stemming from these two requirements, several other indicators of the availability of the defence have been developed. Necessity requires the attack that is resisted with defensive force to be imminent. It also requires that there should be no other reasonable option or solution open to the defender, other than to resort to force for self-protection. This lack of an alternative action is sometimes referred to as the ‘duty to retreat’, although in fact there is no actual duty; it is rather a factor to be considered.<sup>130</sup> Under the requirement of necessity, the legal response to mistakes is discussed as such cases are problematic in that the defender is mistaken in relation to the need for defensive action. Similarly, it is important that the defender be aware of the circumstances justifying his use of force, as a lawful purpose is a key component of the defence.

On the other hand, the proportionality requirement demands that only a reasonable amount of force be used, i.e. that the defensive force should be proportional to the aggressive force it resists.<sup>131</sup> Excessive force should be deterred and could potentially deny the availability of the defence. Each element merits individual attention and will be discussed in the following order: necessity (imminence, duty to retreat) and proportionality (reasonable force).

### **2.1.1(a) Necessity – Imminence**

First, the requirement of imminence refers to the immediacy<sup>132</sup> of the harm that would be suffered and its proximity to the defensive action exerted. The attack, which it is necessary to avoid by the use of force, must be about to happen, posing an immediate

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<sup>130</sup> As mentioned on the previous page.

<sup>131</sup> B.Sangero *Self-Defence in Criminal Law*, *op cit* fn 73 at 34.

<sup>132</sup> These terms (imminence and immediacy) are used almost interchangeably in this research. The literature on self-defence and the judgements of the courts use both terms to explain the other, for example an immediate threat of attack indicates an imminent need for defensive force. However, by way of comparison with a different jurisdiction, Alexander praised the change within the Model Penal Code from the common law preference for the term ‘imminent’ to ‘immediately necessary’. This is a positive change as ‘*there may be many situations where the use of defensive force may be immediately necessary but where the attack is not imminent*’. L.Alexander ‘A Unified Excuse of Preemptive Self-protection’ (1998-1999) 74 *Notre Dame Law Review* 1475, at 1477. Suggested examples of immediate necessity but non-imminent threats could be cases involving victims of domestic abuse, or cases where preparatory action is taken.

threat to the defendant. A threat that may materialise in the distant future is insufficient. The purpose of this rule is to ensure that self-defensive action is only taken when it is absolutely necessary. Thus, if there is a reasonable alternative to the use of force, self-defence will not be available. If there is no present danger, then the defence will most likely be denied.

Leverick notes that the law of England and Wales has moved away from the notion that imminence is a definite requirement of self-defence<sup>133</sup> to the current position that it is merely a factor to be considered with regard to the necessity of force.<sup>134</sup> Herring's view is compatible with this approach as he states that '*It is not absolutely necessary to show that the attack is imminent or immediate*'.<sup>135</sup> Indeed, this appears to be in line with the clarification offered with regard to reasonable force in the legislative provision. Section 76 of the Criminal Justice and Immigration Act 2008 does not expressly identify imminence as a requirement or a relevant consideration.<sup>136</sup> While subsections (7)(a) and (b) refer to 'necessary action', imminence is not specifically identified within the provision. However, it should be noted that subsection (8) declares that other considerations may be taken into account, and thus, the absence of an express provision in the statute should not be read as excluding the need for imminence. It is argued here that while imminence seems to be mostly indicative of reasonable force, it should also be regarded as a requirement of self-defence. Appropriately, it would appear that imminence remains to be a factor that is considered by the courts.

For example, in the case of *Hitchens*,<sup>137</sup> the Court of Appeal clearly regarded imminence to be a relevant consideration, a question they referred to as one of 'remoteness'. It was stated that in cases of self-defence, there is

*'greater scope for operation where it is certain or nearly certain that a crime will be committed immediately if action is not taken. Conversely, the lower the degree of likelihood of a crime being committed and the*

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<sup>133</sup> There are examples of cases where the courts appear to have applied a requirement of imminent danger. See for example, *R v Palmer* *op cit* fn 105; *Attorney-General for Northern Ireland's Reference (No 1 of 1975)* [1977] AC 105 (HL); and *R v Shaw* [2001] UKPC 26.

<sup>134</sup> F.Leverick *Killing in Self-defence* *op cit* fn 8 at 95-96.

<sup>135</sup> J.Herring *Criminal Law: Text, Cases, and Materials*, (6th edn, Oxford University Press, Oxford, 2014), at 644.

<sup>136</sup> A.Ashworth & J.Horder *Principles of Criminal Law*, *op cit* fn 18 at 123.

<sup>137</sup> *R v Hitchens* [2011] EWCA Crim 1626; [2011] 2 Cr App R 26.



*greater the time between awareness of the risk and the time when the crime might be committed, so the scope for any defence to have any realistic prospect of success will be correspondingly reduced.*<sup>138</sup>

This demonstrates the need to assess imminence as evidence of reasonableness. The question of probability or remoteness is also telling, as there will almost always be uncertainty regarding the future. Thus, the probability of attack is highly relevant to imminence, as if an attack has not been initiated and does not constitute an active threat upon the defender, it is much more challenging to assess that the force used was necessary. This is a matter of relative knowledge and proof; the more that is known about the extent of the threat or attack, the more evidence there is of a need for defensive force, and the type of force it was reasonable and proportionate to use. The less that is known, due to the lack of urgency in the threat faced, the more doubtful the need for force becomes, and the possibility that another course of action was open to the defender is increased.<sup>139</sup> Imminence is not only concerned with the immediacy of an attack, but also the degree to which it was truly impending and how likely it was to materialise. It is therefore an important aspect of proving the reasonableness of force, and Bakircioglu describes imminence ‘as a litmus test to detect possible abuses of the self-defence doctrine’.<sup>140</sup>

There are many circumstances for which the imminence aspect presents an obstacle, for example cases involving ‘battered women’<sup>141</sup> and also the possession of some form of weapon. Indeed, many cases have arisen where the courts have demanded imminence within the context of weapons offences, as a key method of restricting unmeritorious pleas of self-defence.<sup>142</sup> The flaw of a liberal approach to the carrying of weapons for self-defence is the reality that many people would simply be unable to use the weapon to overpower an aggressor. While firearms are always more effective as they facilitate a defence yet maintain a safe distance between the aggressor and the

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<sup>138</sup> *ibid*, at 31.

<sup>139</sup> F.Leverick *Killing in Self-defence op cit* fn 8 at 89, and 101; B.Sangero *Self-Defence in Criminal Law, op cit* fn 73 at 147.

<sup>140</sup> O.Bakircioglu ‘The Contours of the Right to Self-defence: Is the Requirement of Imminence Merely a Translator for the Concept of Necessity?’, *op cit* fn 16 at 131.

<sup>141</sup> As explained in Chapter 1, a detailed exploration of this issue is beyond the scope of this study, and it is merely highlighted here as a matter of relevance. Much discussion has surrounded this particular situation within the academic community. For examples, see fn 16.

<sup>142</sup> This is connected to the discussion in Chapter 3 on the importance of an assessment of imminence and the circumstances when considering the statutory defences available to offences of possessing offensive weapons or bladed articles. See section 3.4.1.

victim, they are also liable to be disproportionate. In terms of pre-emptive action, the greater distance raises a problem in terms of probability, as if the threat does not materialise, the grave action of firing the weapon cannot be reconsidered or withdrawn. Whereas with a weapon like a knife, used for close combat, the probability of danger and the nature of the threat will be much clearer, and confirmed by the proximity between the aggressor and victim by the time it is necessary to use. Contrarily, with such weapons, although the imminence requirement can be proved more satisfactorily, they do not necessarily provide sufficient protection for a vulnerable individual, such as a frail elderly person, who may lack the strength to use it in self-defence.

Imminence is clearly a strong indicator of the necessity of the defensive action, especially when pre-emptive actions are involved, and is therefore a required component of self-defence. The more immediate the threat or attack, the more reasonable it will be to take defensive action to resist it. It is much easier to assess whether an action is taken in self-defence when an attack is taking place or is about to commence, than when an individual has perceived a risk, and acts in preparation to enable a response to the threat. Naturally this is due to the tangibility of an occurring attack, while a threat of a future attack is intangible. This makes it difficult to prove the probability of the attack, and to assess its nature and gravity. Imminence provides a safeguard against acts that occur too early in the developing stages of an attack for them to truly be regarded as self-defence, before the scale of attack can be appreciated. A danger with pre-emptive action, where preparation does ensue too early, is that the defender might act before the aggressor has formed his intention to kill, thus before the likelihood and nature of the threat is confirmed.<sup>143</sup>

It is suggested that the flexible treatment of imminence is due to the fact that sometimes a defence may be reasonable despite the absence of an impending attack. One common example that is offered to demonstrate this is a case of kidnap, where the harm to the victim may not be immediate, as there may be a few days, or even weeks perhaps, before they will be in imminent danger, but yet they should be permitted to act defensively to secure their escape and safety as and when it is

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<sup>143</sup> D.Wasserman 'Justifying Self-Defense' (1987) 16(4) *Philosophy and Public Affairs* 356, at 373.

possible for them to achieve a successful defence.<sup>144</sup> Indeed, Sangero argues that such situations satisfy the legal requirements of self-defence as the situation can be interpreted as imminent from the point at which a threat has been recognised,<sup>145</sup> in this example, from the point that the victim is kidnapped onwards. While this is a relatively liberal interpretation of imminent, it is compelling as it is relative to the exceptional circumstances. It is also in line with the right to life and the general aims of requiring imminence, which is to prevent the killing of innocent people who are not posing a threat or inflicting an attack on the defender.<sup>146</sup>

Alexander notes the need to consider the probability of attack, but suggests that rather than focusing upon this factor, it would be more appropriate to question the defender's actions according to whether it is compatible with the reactions of a 'person of reasonable firmness' in the circumstances.<sup>147</sup> However, this suggestion would not clarify or solve the issue. Essentially, it does not reduce the relevance of the probability of attack to an assessment of a pre-emptive strike. It would not alter the position, as defending against an attack that is unlikely to materialise, would not be considered in line with the actions of a 'person of reasonable firmness' in the circumstances. Probability remains a relevant consideration, as without it, conducting an analysis of the reasonableness of preparatory actions would be unattainable.

However, despite the appearance thus far that pre-emptive actions cannot be taken, the contrary is true, and there is potential to rely on self-defence in specified situations. Indeed, as Ferzan states, the need for defence could arise much earlier in the chain of events than when the aggressive act itself has begun.<sup>148</sup> It is recognised that a defender does not have to wait for the attacker to strike the first blow and can take measures to avoid the danger in anticipation of a forthcoming attack.<sup>149</sup> According to Rodin, there is no requirement that physical harm must be suffered by

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<sup>144</sup> J.Herring *Criminal Law: Text, Cases, and Materials*, *op cit* fn 135 at 644-645; O.Bakircioglu 'The Contours of the Right to Self-defence: Is the Requirement of Imminence Merely a Translator for the Concept of Necessity?', *op cit* fn 16 at 159.

<sup>145</sup> B.Sangero *Self-Defence in Criminal Law*, *op cit* fn 73 at 160-161.

<sup>146</sup> O.Bakircioglu 'The Contours of the Right to Self-defence: Is the Requirement of Imminence Merely a Translator for the Concept of Necessity?', *op cit* fn 16 at 139.

<sup>147</sup> L.Alexander 'A Unified Excuse of Preemptive Self-protection', *op cit* fn 132 at 1496-1497.

<sup>148</sup> K.K.Ferzan 'Culpable Aggression: The Basis for Moral Liability to Defensive Killing' (2011-2012) 9 *Ohio State Journal of Criminal Law* 669, at 687.

<sup>149</sup> *R v Beckford* *op cit* fn 103, at 144.

the defender before any harm he causes to the aggressor in his own defence will be permissible. The reason for this is that inflicting a defensive harm to prevent a rights violation is sufficient.<sup>150</sup> As aggressors in cases of self-defence are interfering with the defender's rights,<sup>151</sup> this is satisfied, even without the presence of physical harm as the very risk created by the aggressor constitutes a form of harm to the defender.

Nevertheless, even when a pre-emptive action may be permissible, the element of imminence must remain to a certain extent. The limitation placed on pre-emptive action is that the '*attack must be, or believed to be, imminent*'.<sup>152</sup> The reason for this is to ensure the protection of the rights and interests of the aggressor, the importance of which will become evident during the discussion on the rights theory.<sup>153</sup> The imminence requirement therefore limits actions that extend beyond the reasonable scope of the defence, acting as a barrier to self-made law, which is an increased risk when preparatory actions are taken due to the uncertain nature of the aggressive acts it seeks to repel.<sup>154</sup>

Comparisons can be drawn between preparatory actions of self-defence and the law regarding criminal attempts, due to the non-commission or non-commencement of the threat or attack.<sup>155</sup> Section 1(1) of the Criminal Attempts Act 1981 states that an attempt is '*an act which is more than merely preparatory to the commission of the offence*'.<sup>156</sup> Culver notes that the test searches for '*conduct which is not so near the beginning of commission of a criminal offence that detection would involve unbearable intrusion on individual autonomy, yet prior to the 'last act' required for that offence*'.<sup>157</sup> The expectation is that something more than merely preparatory has been committed before an attempt will be found, namely, identifiable steps have been

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<sup>150</sup> D.Rodin 'Justifying Harm' (2011) 122(1) *Ethics* 74, at 98.

<sup>151</sup> This will be discussed in more detail in section 2.2.1.

<sup>152</sup> R.Stone *Offences Against the Person*, (Cavendish Publishing Ltd, London, 1999), at 178.

<sup>153</sup> See section 2.2.1.

<sup>154</sup> This restrictive function of the imminence requirement will be explored further in Chapter 3, which focuses on carrying weapons as a preparatory action. The imminence requirement also ties in with the approach of natural law theory, which will be discussed under theories of justification later in the present chapter, as there is a strong emphasis on necessity.

<sup>155</sup> Further discussion on attempts as inchoate offences is provided in Chapter 6, section 6.1.7. This subsequent analysis will focus on the relevance of the emotion of guilt and considers cases where harm does not occur.

<sup>156</sup> Criminal Attempts Act 1981, section 1(1).

<sup>157</sup> K.Culver 'Analyzing Criminal Attempts' (1998) 11(2) *Canadian Journal of Law and Jurisprudence* 441, at 445.

taken towards the completion of the crime.<sup>158</sup> Attempts are usually punished less severely than the completed offence as a result of the degree of harm which has, or rather has not, been caused. The attempt to commit a crime is itself a crime, not because of the injury it inflicts on an individual or society, but because of its potential danger to the public.<sup>159</sup> The language of a crime of attempt and a pre-emptive act of self-defence are similar, although their outcomes may be very different. While an act more than merely preparatory in the context of an attempt will be sufficient to commit the offence, the action of preparation in a case of self-defence does not bar the defence, and it may be held permissible, depending on the circumstances.

The possession of offensive weapons for self-defensive needs is punished comparatively similarly to attempts. Although carrying a weapon alone does not of itself inflict an injury, it increases the danger to the public generally. The act of mere possession is therefore a punishable offence, just as intending and initiating action towards committing a certain crime but failing to complete it is a crime. *‘That those should not be allowed to go free who attempt to commit some crime but fail, is a feeling deep rooted and universal’*,<sup>160</sup> but perhaps the difference between the criminality of an attempt, and a preparatory self-defensive action, is essentially centred upon the intention of the perpetrator. While in the former there is a guilty intention, which satisfies the *mens rea* of the crime attempted, the same is not true of the latter, as an intention to act in self-defence is not an unlawful intention. As the defender’s self-defensive intention is formed as a direct response to the aggressor’s behaviour, the reaction is acceptable within the difficult circumstances that face the defender.<sup>161</sup> The aggressor’s behaviour places the defender in a difficult position, and the defender’s self-defensive intention is acceptable as it is formed in response to the predicament he faces due to the aggressor’s behaviour. The defender’s intention involves the belief that the use of force will prevent the threat posed by the aggressor.<sup>162</sup> By offending, the aggressor chooses to be placed in a position where force may lawfully be used against him when necessity so requires.<sup>163</sup>

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<sup>158</sup> J.H.Jr.Beale ‘Criminal Attempts’ (1903) 16 *Harvard Law Review* 491, at 502.

<sup>159</sup> *ibid* at 491 and 502.

<sup>160</sup> F.B.Sayre ‘Criminal Attempts’ (1928) 41(7) *Harvard Law Review* 821, at 821.

<sup>161</sup> H.Frowe, *op cit* fn 97 at 3.

<sup>162</sup> *ibid* at 100.

<sup>163</sup> S.Uniacke ‘Self-Defence and Natural Law’ (1991) *The American Journal of Jurisprudence* 74, at 99. See section 2.2.4. for further analysis on forced choice.

While imminence does not currently form a separate requirement of self-defence, and is merely a factor for consideration, it should be an influential component, and feature within the legislative provisions that clarify the meaning of reasonable force. The reason for this argument is the fact that imminence and probability of harm are such strong indicators of reasonableness, that where they are absent, serious questions may be raised with regard to whether the force was at all necessary.<sup>164</sup> However, in the same respect as that the possibility of retreat is merely an indication of self-defence; it is perhaps wise to avoid an overly strict interpretation of this requirement.

This could be achieved by requiring a consideration of imminence and probability as an indicator of necessary force, but apply a context sensitive approach in each individual case. This would be consistent with the objective and subjective elements of self-defence. For example, failure to prove imminent danger should perhaps not bar the application of self-defence completely. Rather, if there is a reasonable belief that a significant probability of danger is present, and the defender acted at the only available opportunity to repel this danger, then such action should be open to consideration by a jury as being capable of satisfying necessary force, and consequently, reasonable force. This could be monitored by requiring a high standard to be reached, namely the ‘inevitability of harm’, which Leverick suggests to be a more appropriate measure of necessity.<sup>165</sup> This would operate as a safeguard against fears of widening the net too far, but also acknowledge cases where imminence may be satisfied as a matter of the probability of harm. This would not extend the scope of reasonable force too broadly, as probable danger is as much evidence of lawful self-defence as is imminent danger. It is argued here that all aspects of imminence should be retained and should feature more prominently within the legal position on reasonable force.

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<sup>164</sup> It was stated in the case of *R v Palmer* that ‘If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction’. *R v Palmer* *op cit* fn 105 at 831.

<sup>165</sup> F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 102, and 108.

### 2.1.1(b) Necessity – Retreat

The second consideration deriving from the requirement of necessity is the possibility of safely retreating. Opinion and expectation concerning this condition as an aspect of self-defence have changed over the years. It has developed from the belief that there was an absolute ‘duty to retreat’ to the law today, where no ‘duty’ as such exists. The retreat tradition was based on the English common-law system, especially in the writings of William Blackstone.<sup>166</sup> The concept behind the rule of retreat reflected the doubts of the courts regarding pleas of self-defence, and concerns that the defence could mistakenly be perceived as the right to kill, instead of the right to defend.<sup>167</sup> It was due to this fear that the retreat rule was developed, which required that individuals attempt to avoid the situation if possible before resorting to force.

Leverick has examined different variations of retreat rules in a comparative study, and found that there are at least four possible legal approaches.<sup>168</sup> First, there is the absolute retreat rule, where if it is possible to retreat, this must be the course of action chosen by the defender. Second, there is a strong retreat rule, requiring an attempt to retreat if possible prior to resorting to force. Third, there is a weak retreat rule, which Leverick states is the position of the law in England and Wales.<sup>169</sup> This variation does not regard retreat as a conclusive criterion for lawful self-defence, but rather a consideration to be taken into account when assessing the reasonableness of the force used. Finally, there is the no retreat rule, where retreat does not come into the deliberation process of determining lawful instances of self-defence at all.<sup>170</sup>

Currently there is no rule of law stating that a person must retreat before acting in self-defence in England and Wales. The court in *R v Julien*<sup>171</sup> held that in order to rely on a claim of self-defence, it would be sufficient for a defendant to prove that he had

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<sup>166</sup> 4 Bl Comm 185. It is explained here that ‘the law requires, that the person, who kills another in his own defence, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant’.

<sup>167</sup> J.W.Bobo ‘Following the Trend: Alabama Abandons the Duty to Retreat and Encourages Citizens to Stand their Ground’ (2007-2008) 38 *Cumberland Law Review* 339, at 341.

<sup>168</sup> F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 69.

<sup>169</sup> *ibid* at 70.

<sup>170</sup> *ibid* at 69-74. In comparison to the position in England and Wales, the approach in many States in America has changed towards a no retreat rule. There is a connection to be drawn here with the castle doctrine applying to self-defence in the home, and this will be explored in Chapter 5.

<sup>171</sup> *R v Julien* [1969] 1 WLR 839, at 840.

shown an unwillingness to fight. This approach has been relaxed further as, according to the decision in *R v McInnes*,<sup>172</sup> the possibility of a retreat is not a conclusive factor, but is merely an element to be considered when deciding on the availability of self-defence.<sup>173</sup> The case of *R v Field*<sup>174</sup> reflects this rule, stating that individuals are not even under the duty to avoid a specific place or area in which the danger of attack is more likely or expected to occur; a person may nevertheless go there despite such knowledge.<sup>175</sup> Arguably this is an expression of the value and privilege accorded to individual autonomy and liberty within the law. This interpretation was confirmed by the court in the case of *R v Bird*,<sup>176</sup> where it was stated that evidence of an attempt to withdraw from a fight was merely a factor to be considered as indicative of self-defensive force. Therefore, it appears settled that only a weak form of duty to retreat exists in the law of England and Wales today.<sup>177</sup>

The main concern is proving that the reaction is deemed reasonable in the circumstances.<sup>178</sup> In other words, if it is possible for the victim to retreat safely,<sup>179</sup> the decision to use force instead might not be reasonable, but that does not mean that one is always under a duty to run away. This is especially true in relation to attacks that occur in the home, where the householder is in a difficult position and has few options available. Kadish discusses the duty to retreat in criminal law and says that as a ‘*condition of using deadly force [it] has traditionally been a minority rule, and even today many jurisdictions reject it. Indeed, when it is required, there is never a duty to*

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<sup>172</sup> *R v McInnes* *op cit* fn 104 at 300.

<sup>173</sup> As reinforced by section 148 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which inserted subsection 6(A) into section 76 of the Criminal Justice and Immigration Act 2008.

<sup>174</sup> *R v Field* [1972] Crim LR 435.

<sup>175</sup> The Scottish case of *Carr v HM Advocate* 2013 Scot (D) 17/7; [2013] HCJAC 87 is interesting in this respect. An appeal was allowed on the basis that the defence of self-defence had been withheld from the jury, as the defendant had taken a samurai sword with him in search for an adversary which he feared and had been threatened by. It was held that the defence must be left for consideration by the jury providing there was a possibility that on the basis of the evidence provided, the jury might find the defence was satisfied.

<sup>176</sup> *R v Bird* [1985] 2 All ER 513, at 516.

<sup>177</sup> F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 70.

<sup>178</sup> Following the change of test for householder cases, what may be considered reasonable in the circumstances has now been extended to include anything up to ‘grossly disproportionate force’.

<sup>179</sup> As Frowe notes, retreating represents one form of defensive action available to the defender. H.Frowe, *op cit* fn 97 at 34.



*abandon one's home or (in many jurisdictions) similar places, like one's place of business'*.<sup>180</sup>

When assessing the possibility of retreating, the cases of *R v Gladstone Williams*<sup>181</sup> and *R v Beckford*<sup>182</sup> held that the issue is to be looked at subjectively, from the circumstances as the defendant believed them to be, whether reasonable or not. Although one need no longer 'flee to the wall',<sup>183</sup> before self-defence may be claimed, common morality<sup>184</sup> asserts that it is always preferable to avoid the use of force where it is possible,<sup>185</sup> because although '*it is undoubtedly distasteful to retreat ... it is ten times more distasteful to kill*'.<sup>186</sup> The reason for this can be summed up under utilitarian reasoning,<sup>187</sup> that the survival of both parties by the retreat of one, as opposed to causing some injury or harm to the aggressor by the decision of the defender to stand his ground and fight, is the lesser harm in this scenario.

Kroeze has summarised utilitarianism as '*a theory of judging legal rules and institutions based not on deontological morality but on the question of whether it maximised happiness and minimized unhappiness*'.<sup>188</sup> According to Bentham, all actions are subject to the analysis of the utility principle with regard to the augmentation or diminution of happiness.<sup>189</sup> Inflicting harm is a graver consequence than the potential feeling of cowardice or shame that ensues from retreating, and the

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<sup>180</sup> S.H.Kadish 'Respect for Life and Regard for Rights in the Criminal Law' (1976) 64 *California Law Review* 4, at 887. An exploration of the differences between private and public places, and the special nature of the home in particular, will be provided in Chapter 5.

<sup>181</sup> *R v Gladstone Williams*, *op cit* fn 103, at 415.

<sup>182</sup> *R v Beckford*, *op cit* fn 103 at 145.

<sup>183</sup> As was the old condition in cases of chance-medley - the historical term that was used for cases of self-defence. J.H.Jr.Beale 'Retreat from a Murderous Assault' (1903) 16 *Harvard Law Review* 567, at 575; and see also Blackstone's discussion on this in 4 BI Comm 184.

<sup>184</sup> The term common morality is used to refer to what Lord Devlin regarded as the '*invisible bonds of common thought*', and a moral position that would be accepted by the majority of society. P.Devlin *The Enforcement of Morals*, (Oxford University Press, Oxford, 1965), at 10.

<sup>185</sup> H.Frowe, *op cit* fn 97 at 117.

<sup>186</sup> J.H.Jr.Beale 'Retreat from a Murderous Assault', *op cit* fn 183, at 581.

<sup>187</sup> Utilitarian reasoning seeks to maximise the greatest good for the greatest number, therefore, that which provides a benefit for the greatest number is the preferable course of action.

<sup>188</sup> I.J.Kroeze 'Legal Positivism' in C.Roederer & D.Moellendorf *Jurisprudence*, (Juta & Company Ltd, Lansdowne, 2007), at 66. See also J.Driver 'The History of Utilitarianism' in E.N.Zalta (ed), *The Stanford Encyclopedia of Philosophy*, (Winter 2014 Edn), <<http://plato.stanford.edu/archives/win2014/entries/utilitarianism-history/>> (accessed on 24/07/15), at 2.1.

<sup>189</sup> J.Bentham *Theory of Legislation*, (Hildreth, R. tr, Kegan Paul, Trench, Trübner & Co., Ltd, London, 1894), at 2.

guilt accompanying such conduct is also a heavier burden to carry.<sup>190</sup> Morality requests that no harm be caused where it is not absolutely necessary as a last resort act of self-protection. Therefore, where an alternative to using defensive force is available, for example by contacting the police and retreating, this should be pursued before resorting to violence,<sup>191</sup> so that no moral or criminal wrong is committed.<sup>192</sup> It appears that this is a cultural and perhaps an era judgement as well, and reflects the attitudes of modern society following the development of widely accessible national and regional law enforcement.<sup>193</sup>

It is worth noting briefly the comparison that may be drawn between the legal approach in England and Wales and that of some individual states within the USA. Approaches have changed during the past decade in some American States regarding the retreat rule.<sup>194</sup> Despite the need for a reasonable retreat to be taken where such an option is available, “stand your ground” privileges have developed (mainly in the context of homeowners who are threatened within their own home),<sup>195</sup> allowing the abandonment of the retreat rule. Florida is said to have started the trend in 2005 as the first state to abandon the rule of retreat.<sup>196</sup> Leverick notes:

*‘at least fifteen US states have abandoned the retreat rule, even where lethal self-defensive force is involved ... permitting any person who is not engaged in unlawful activity and who is attacked in any place where she has a right to be to use deadly force against an attacker without having to take a safe opportunity to escape’.*<sup>197</sup>

<sup>190</sup> The degree to which an actor experiences feelings of guilt varies from individual to individual. For example, a ‘vicious criminal’ is less likely to feel guilt than a ‘weak-willed offender’. R.A.Duff ‘Virtue, Vice, and Criminal Liability: Do We Want an Aristotelian Criminal Law?’ (2002-2003) 6 *Buffalo Criminal Law Review* 147, at 169.

<sup>191</sup> F.Leverick ‘Defending Self-defence’ (2007) *Oxford Journal of Legal Studies* 563, at 579. This will be considered in Chapter 5, which discusses location.

<sup>192</sup> This is compatible with the weak rule of retreat in operation in England and Wales, as it involves only the taking of reasonable steps in the circumstances, and is merely one consideration to take into account regarding the overall reasonableness of the use of force.

<sup>193</sup> The assertion made here is that institutional structures have been developed to take the responsibility of protection away from citizens and onto trained police and military officers.

<sup>194</sup> See the following page.

<sup>195</sup> This concept will be discussed in more detail under section 5.1.3 on the castle doctrine in Chapter 5.

<sup>196</sup> J.P.Neyland ‘A Man’s Car is His Castle: The Expansion of Texas’ “Castle Doctrine” Eliminating the Duty to Retreat in Areas Outside the Home’ (2008) 60 *Baylor Law Review* 719, at 726.

<sup>197</sup> F.Leverick ‘Defending Self-defence’, *op cit* fn 191 at 579. The number of States that currently employ stand your ground laws has risen since this article was published, to around half of the fifty American States. There are however many others that have retained a rule of retreat. See National Urban League, Mayors Against Illegal Guns & VoteVets.org, ‘Shoot First: ‘Stand your Ground’ Laws and their Effect on Violent Crime and the Criminal Justice System’, (2013), <<http://everytown.org/documents/2014/10/shoot-first.pdf>> (accessed on 08/07/15); FindLaw, *States*

Bobo has also written about this trend, and has looked in particular at Alabama, which employs the same approach as Florida. He explains that the change in the law there creates a presumption that whenever citizens believe someone has intruded into their dwelling, they will have a justification for using force against them in self-defence. It also encompasses situations occurring outside of the home, so that the presumption applies to any location where the defender has a right to be. This presumption may of course be rebutted, but the burden of disproving it will be upon the prosecution.<sup>198</sup> Alabama's courts had protected the duty to retreat, inherited from the English common-law system for many years. However, it has been removed from the law as it was considered to be incompatible with the culture, era, and beliefs of the majority of American people,<sup>199</sup> or the 'American mind',<sup>200</sup> that viewed retreating as cowardly.<sup>201</sup>

While England and Wales retain a weak rule of retreat, it does not directly discriminate on the ground of location, as retreat is merely a consideration to be taken into account. It depends upon what is reasonable in the circumstances. However, it is possible that the new test for householders<sup>202</sup> may mean that future cases will apply a weaker consideration of retreat in the home than in areas outside the dwelling. This could potentially lead to the development of indirect discrimination between locations on the ground of retreat. Arguably, the recent changes in England and Wales have moved closer to the notion of a presumption of lawful self-defence, by permitting anything up to 'grossly disproportionate force'.<sup>203</sup> This empowers the defender far

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that Have Stand your Ground Laws, <<http://criminal.findlaw.com/criminal-law-basics/states-that-have-stand-your-ground-laws.html>> (accessed on 10/02/15); A.Gruber 'Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground' (2013-2014) 68 *University of Miami Law Review* 961, at 971; and A.Abuznaid et al. 'Stand Your Ground' Laws: International Human Rights Law Implications' (2013-2014) 68 *University of Miami Law Review* 1129, at 1132-1133.

<sup>198</sup> J.W.Bobo, *op cit* fn 167 at 361.

<sup>199</sup> This statement is at risk of being regarded as a sweeping generalisation. However, the American academic discussion on this issue indicates such a collective movement towards changing an unfairly perceived legal position. Thus, the law of retreat has been adapted in accordance with calls for more security for the innocent defender. While this might not represent the beliefs of all American people, it seems there was a substantial opposition to the rule of retreat.

<sup>200</sup> L.Zbrzezny 'Florida's Controversial Gun Policy: Liberally Permitting Citizens to Arm Themselves and Broadly Recognizing the Right to Act in Self-defense' (2011-2012) 13 *Florida Coastal Law Review* 231, at 235-236.

<sup>201</sup> J.W.Bobo, *op cit* fn 167 at 339.

<sup>202</sup> This will be fully explained in Chapter 4.

<sup>203</sup> This is discussed in more detail in Chapter 5 when considering 'castle doctrine'.

more by prioritising his interests over those of the aggressor's, and a similar approach is taken in relation to mistake.

### **2.1.1(b)(i) Mistake**

Occasionally, defenders mistake the circumstances and the need for force in self-defence. Mistaken belief is an interesting factor in relation to the defence in the law of England and Wales.<sup>204</sup> Where a person is mistaken in believing that there is a need to use defensive force, the mistaken belief should be honestly held, but need not be reasonable in order to secure an acquittal on the grounds of self-defence.<sup>205</sup> The origin of this rule was the *R v Gladstone Williams* case,<sup>206</sup> where it was decided that self-defence could be pleaded in relation to an honest, but unreasonable belief held by the defendant that he was being attacked. The reason for this approach is that the defender is acting with the lawful purpose of self-protection.<sup>207</sup> Although mistaken as to the need for force, when a person acts to defend himself, he is not acting unlawfully,<sup>208</sup> but rather is responding within the justifying circumstances of self-defence.<sup>209</sup>

This approach towards mistaken belief was confirmed in the case of *R v Beckford*<sup>210</sup> and later in *R v Owino*,<sup>211</sup> where it was submitted that a defendant was to be judged according to his honest belief, even if it was mistaken, and that it is the role of the jury to determine whether the force used was reasonable in the circumstances as the

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<sup>204</sup> Mistaken belief is closely related to 'putative self-defence', explained by Fletcher as a situation where the defender '*reasonably believes that he is being attacked, but in fact is not, and uses force against a person who is not in fact an aggressor*'. G.P.Fletcher 'The Right and the Reasonable' *op cit* fn 83 at 972. See also, G.P.Fletcher *Rethinking Criminal Law op cit* fn 70 at 766.

<sup>205</sup> This is in contrast to Scots law, where following the case of *Owens v HM Advocate* 1976 JC 119 any mistake as to the imminence of an attack must be reasonably held. For a discussion on this, see F.Leverick 'Unreasonable Mistake in Self-Defence: *Lieser v HM Advocate*' (2009) 13(1) *Edinburgh Law Review* 100, at 100.

<sup>206</sup> *R v Gladstone Williams op cit* fn 103 at 415. It was stressed here that an unreasonable mistake could be a 'powerful reason' for doubting whether the belief was in fact honestly held.

<sup>207</sup> F.Leverick 'Is English Self-defence Law Incompatible with Article 2 of the ECHR?' (2002) *Criminal Law Review* 347, at 348.

<sup>208</sup> O.Quick & C.Wells, *op cit* fn 128 at 347. See also section 2.1.1.(b)(ii) Chapter 2 on the need for individuals to be aware of the justifying circumstances of their actions.

<sup>209</sup> F.Leverick *Killing in Self-defence, op cit* fn 8 at 37.

<sup>210</sup> *R v Beckford op cit* fn 103 at 147. This case is controversial as it involved an armed police officer who acted in mistaken self-defence. Given his training, status, and weapon, it is argued that the law should not have been extended to him in this manner, and is only appropriate to private citizens. See for example, A.Norrie 'The Problem Of Mistaken Self-Defense: Citizenship, Chiasmus, and Legal Form' (2010) 13(2) *New Criminal Law Review* 357, at 378.

<sup>211</sup> *R v Nimrod Owino* [1996] 2 Cr App R 128, at 133.

defendant believed them to be.<sup>212</sup> This ruling was followed in *R v Shaw*,<sup>213</sup> which declared that ‘it was not the actual existence of a threat but the appellant’s belief as to the existence of a threat which mattered’.<sup>214</sup> Therefore, it may be considered that the application of self-defence is relatively broad in this context.

There are debates about the compatibility of this rule and Article 2 of the European Convention of Human Rights (ECHR).<sup>215</sup> For example, Leverick argues that there is room to believe that the law of England and Wales is incompatible with the Convention right to life.<sup>216</sup> Wicks agrees, and states that

*‘the lack of any requirement of objective justification for a mistaken belief is a serious shortcoming in English law’s protection of the right to life and should be rectified as soon as possible in a manner that continues to protect the individual who forms an erroneous perception of the situation due to fear and panic but also ensures that the victim of such a mistaken perception is not legitimately killed in the absence of any good reason’.*<sup>217</sup>

Although no ruling of incompatibility has been provided to date, it does appear that the present position of the law falls short of the convention requirement that the force should be ‘absolutely necessary’.<sup>218</sup> The present position makes it too easy for people to claim mistaken self-defence, and a higher standard should be employed.<sup>219</sup>

The law of rape provides a strong illustration of the difference between a standard of genuine or honest belief, and that of a reasonable belief when assessing mistake. In the case of *DPP v Morgan*<sup>220</sup> Mr Morgan had invited three men home to have sexual intercourse with his wife. He had stated that although she would consent, she would

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<sup>212</sup> F.Leverick ‘Is English Self-defence Law Incompatible with Article 2 of the ECHR?’, *op cit* fn 207 at 348.

<sup>213</sup> *R v Shaw op cit* fn 133.

<sup>214</sup> *ibid*, at 21.

<sup>215</sup> European Convention of Human Rights 1950.

<sup>216</sup> F.Leverick ‘Is English Self-defence Law Incompatible with Article 2 of the ECHR?’, *op cit* fn 207 at 348.

<sup>217</sup> E.Wicks *The Right to Life and Conflicting Interests*, (Oxford University Press, New York, 2010), at 135-136.

<sup>218</sup> See section 2.2.1; and J.C.Smith ‘The Right to Life and the Right to Kill in Law’ (1994) 144 *New Law Journal* 354.

<sup>219</sup> A.Norrie ‘The Problem Of Mistaken Self-Defense: Citizenship, Chiasmus, and Legal Form’, *op cit* fn 210 at 360. The right to life connection and its requirements will be discussed shortly within the present chapter, and the potential incompatibility will be analysed in more detail in Chapter 4, when considering the change of test to allow disproportionate force in householder cases.

<sup>220</sup> *DPP v Morgan* [1976] AC 182.

appear to resist as part of her own sexual enjoyment. The three men used force against her and each had sexual intercourse with her. During the trial the judge had indicated that if the defendants were mistaken about her consent, the mistaken belief must be both honest and reasonable. On appeal against conviction, it was held that the judge had misdirected in relation to mistaken belief, as the mistaken belief need not have been reasonable.<sup>221</sup> Their convictions remained in place despite the misdirection as their beliefs were not considered to be genuine. The law has since been strengthened to require the belief in consent to be reasonable by section 1(1)(c) of the Sexual Offences Act 2003.<sup>222</sup> Nevertheless, the law of rape provides a clear example of the differences in the standards of honest as opposed to reasonable beliefs, and puts into context the greater ease of the honest belief approach.

It is submitted that when an individual acts in self-defence albeit in mistaken circumstances, it would be more appropriate to say that he is claiming an excuse form of the defence, rather than a justificatory form of the defence.<sup>223</sup> The reason for this is that it cannot be considered that the action is acceptable, and therefore it falls short of a justification. Rather, as a wrongful action has occurred, it falls subject to consideration as an excuse. There is a reason why the defender should not be blamed, namely, the belief in the need to act defensively, although this belief was mistaken. This situation is more aligned with the excuse defence than a justification. This ties into the proportionality of the action and will be discussed shortly.<sup>224</sup>

### **2.1.1(b)(ii) Lawful Purpose**

Another condition connected to mistaken belief is that the defender must be acting with a lawful purpose. The defender must prove that he was merely acting to protect himself, with the object of self-defence.<sup>225</sup> There is a requirement that the defendant should be aware of the circumstances justifying the defence, known as the *Dadson*

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<sup>221</sup> *ibid*, at 187.

<sup>222</sup> Section 1(2) of the Sexual Offences Act 2003 provides further direction on reasonable belief: ‘Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents’. The current legal position is clearly more appropriately formulated than previously in this context.

<sup>223</sup> F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 37.

<sup>224</sup> See section 2.1.1.(c).

<sup>225</sup> J.Slater, *op cit* fn 78 at 151.

principle. The rule originated in the case of *R v Dadson*,<sup>226</sup> where a constable who was guarding property on a piece of land, had shot a fleeing thief. At the time, the constable was unaware of the fact that the thief had prior convictions for the same offence, which effectively sanctioned his shooting. Unfortunately, as he did not know of the justifying circumstances, the constable could not rely on the defence.<sup>227</sup>

The principle that individuals should knowingly have a lawful purpose is applicable to self-defence and acts as a deterrent for malicious actions of revenge that are masked as self-defence. This reflects the justificatory nature of the defence by ensuring the greatest protection against possible misuse.<sup>228</sup> It is designed to restrict situations where, for example, A deliberately shoots B without knowing that B intended to kill him. Here, A effectively acts in self-defence saving his own life by terminating B's capacity to carry out his plan. Although justifying circumstances are present, this is not a pure case of self-defence. A is unaware of the fact that he is in danger and that he is acting in self-defence. Consequently, his intention is unlawful as '*a bad motive or purpose bars an actor's force from being justified*',<sup>229</sup> which establishes the *mens rea* for the offence committed.

There is debate that the Dadson principle should no longer apply, that it is only applicable in cases involving public officials and not private individuals, and that it should not be regarded as an authority excluding self-defence to unknowingly justified actors in general.<sup>230</sup> However, Funk concludes that it '*represents a very principled, precedented, coherent, and logically compelling manner of ensuring that unknowingly justified actors cannot benefit from their fortuitous situation*'<sup>231</sup> and it serves its purpose effectively. It would be unfair to depart from this standard, because regardless of the justifying circumstances, the actor's intention remains impermissible and should not enable a defence in this instance. This brings the discussion onto the next requirement of self-defence, that of proportionality.

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<sup>226</sup> *R v Dadson* [1850] 175 E.R. 499; (1850) 3 Car. & K. 148.

<sup>227</sup> R.L.Christopher 'Unknowing Justification and the Logical Necessity of the Dadson Principle in Self-defence' (1995) 15(2) *Oxford Journal of Legal Studies* 229, at 229.

<sup>228</sup> B.Sangero *Self-Defence in Criminal Law*, *op cit* fn 73 at 228, and 232.

<sup>229</sup> R.L.Christopher, *op cit* fn 227 at 232.

<sup>230</sup> For example, see A.Brudner 'Constitutionalizing Self-Defence' (2011) 61(4) *University of Toronto Law Journal* 867.

<sup>231</sup> T.M.Funk 'Justifying Justifications', *op cit* fn 70 at 647.

### **2.1.1(c) Proportionality - Reasonable Force**

The other vital component of lawful actions in self-defence is proportionality. Its purpose is to protect the rights and interests of the aggressor, by securing that only reasonably necessary force is used against him. This requires that the defensive force used should be proportionate to the aggressive force it resists. Proportionality considers whether the amount of force that was used by the defender was either reasonable or excessive in the circumstances. This is a matter of evaluating and comparing the values involved,<sup>232</sup> through a combination of subjective and objective considerations. The subjective element assesses the individual context of the case to examine whether the actions were reasonable in the circumstances. The objective element deliberates what the ‘reasonable man’ would have thought was necessary in the circumstances. This does not mean that the defender must pause for time to measure the severity of the attack being experienced, in order to respond with exact proportionality. The law acknowledges that in the heat of the moment, when faced by an immediate and unexpected attack, it is not viable to decipher the gravity of the circumstances accurately.

As noted earlier,<sup>233</sup> it was pivotally held in the case of *R v Palmer*<sup>234</sup> that:

*‘if there had been an attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be the most potent evidence that only reasonable defensive action had been taken’.*<sup>235</sup>

Therefore, consideration will be given to the fact that people do not always make the right decision in the face of fear,<sup>236</sup> and that it should be taken into account that the defendant may misjudge the amount of force necessary for successful self-defence.<sup>237</sup>

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<sup>232</sup> S.Uniacke ‘Proportionality and Self-defense’, *op cit* fn 60 at 270-271.

<sup>233</sup> See fn 120, page 37.

<sup>234</sup> *R v Palmer op cit* fn 105, per Lord Morris of Borth-y-Gest.

<sup>235</sup> *ibid*, at 832.

<sup>236</sup> The relevance of fear to the defence is discussed in Chapter 6.



The case also stressed that the use of excessive force in self-defence does not reduce a charge of murder to manslaughter, (as is the case with partial defences).<sup>238</sup> Self-defence is an all-or-nothing defence, so that either it is satisfied and the defendant will be acquitted, or it is disproved and the individual faces a full charge for the offence committed. Despite criticism<sup>239</sup> of the reformed partial defence of loss of control (previously known as ‘provocation’)<sup>240</sup> the defence could potentially be applicable where excessive force has been used. As proportionality is a key requirement of self-defence, an individual who has used excessive force will not be protected under that defence. Contrarily, the loss of control defence may provide leniency to such individuals, as the ‘loss of control’<sup>241</sup> element may explain the excessive amount of force used.<sup>242</sup> Where the defensive force used is grossly disproportionate to the attack faced by the defender, the person will not be able to rely on self-defence to avoid criminal liability for the offence committed. The aggressor must be protected from the use of force that is more than that necessary for the defender’s self-protection,<sup>243</sup> but the alternative defence of loss of control may provide a form of excuse for the action taken.

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<sup>237</sup> While not expecting an exact measurement, the proportionality requirement nevertheless provides a degree of measurement in respect of the amount of force used by the defender. A.J.Sepinwall ‘Defense of Others and Defenseless "Others"' (2005) 17 *Yale Journal of Law and Feminism* 327, at 357.

<sup>238</sup> *R v Palmer op cit* fn 105, at 832. When considering the logic behind this approach in relation to partial defences, it can be said that a degree of blame is attached to the actor for his response and thus the conviction is reduced, not removed. R.Holton & S.Shute ‘Self-Control in the Modern Provocation Defence’ (2007) 27(1) *Oxford Journal of Legal Studies* 49, at 63.

<sup>239</sup> The retention of the ‘loss of control’ element was contrary to the advice of the Law Commission following a full consultation, that the requirement should be removed, as it is ‘unnecessary and undesirable’. Law Commission, *Murder, Manslaughter and Infanticide* (Law Com. No 304, 2006), para. 5.19.

<sup>240</sup> Section 56(1) of The Coroners and Justice Act 2009 abolished the common law partial defence of provocation, which is replaced in sections 54 and 55 of the Act by a new partial defence of ‘loss of control’, reducing a charge of murder to manslaughter where proved. Section 54(1) of the Act provides that ‘Where a person (“D”) kills or is a party to the killing of another (“V”), D is not to be convicted of murder if — (a) D’s acts and omissions in doing or being a party to the killing resulted from D’s loss of self-control, (b) the loss of self-control had a qualifying trigger, and (c) a person of D’s sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D’.

<sup>241</sup> The new ‘loss of control’ provision with its qualifying triggers of fear and anger will be further explored in Chapter 6.

<sup>242</sup> S.Parsons & B.Andoh ‘Comment: Private Defence and Public Defence in the Criminal Law and in the Law of Tort – a Comparison’ (2012) 76 *Journal of Criminal Law* 22, at 24; and C.Elliott ‘A Comparative Analysis of English and French Defences to Demonstrate the Limitations of the Concept of Loss of Control’ in A.Reed & M.Bohlender (eds) *Loss of Control and Diminished Responsibility: Domestic Comparative and International Perspectives*, (Ashgate Publishing Ltd, Surrey, 2011), at 235.

<sup>243</sup> A.Ashworth ‘Self-Defence and the Right to Life’ (1975) 34(2) *Cambridge Law Journal* 282, at 289.

While killing in self-defence is potentially proportionate, depending upon the level of harm averted and caused, a divergent position exists within the defence of necessity. According to necessity, it is doubtful whether it can ever be proportionate to kill. It was stated in the case of *R v Latimer*<sup>244</sup> that

*‘It is difficult ... to imagine a circumstance in which the proportionality requirement could be met for a homicide. We leave open ... the question of whether the proportionality requirement could be met in a homicide situation. In England, the defence of necessity is probably not available for homicide’.*<sup>245</sup>

However, two distinctive points must be noted here: first, the necessity defence is widely regarded as no defence to murder;<sup>246</sup> and secondly, the harm caused in this particular case was clearly disproportionate to what it sought to avert, as the defendant had killed his disabled daughter to avoid her suffering an operation which was not life threatening.<sup>247</sup> Thus, this wider debate does not specifically apply to instances of self-defence, although it does highlight the importance of proportionality within the defence.

In contrast to the consideration of imminence, the requirement for force to be proportionate generally has a firmer position within the current law. This is evident in the provision of section 76(6) of the Criminal Justice and Immigration Act 2008, which states that *‘The degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was disproportionate in those circumstances’*. This identifies the need for force to be proportionate through offering a negative instruction, specifying that disproportionate force falls beyond the scope of reasonable force. This demonstrates the fundamental connection between reasonableness and proportionality, which are reflective of each other. Such is the

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<sup>244</sup> *R v Latimer, (A-G of Canada and others intervening)*, 2001 SCC 1, [2001] 3 LCR 593.

<sup>245</sup> *ibid* 593, at 40.

<sup>246</sup> This has been the position of the law of England and Wales since the famous case of *R v Dudley and Stephens* (1884) 14 QBD 273. Williams notes that the decision in *Latimer* could arguably now have left the door ajar for a future interpretation of necessity as a defence to murder, (although unlikely in relation to assisted dying cases following the Supreme Courts’ decision in *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38). G.Williams ‘Necessity: Duress of Circumstances or Moral Involuntariness?’, *op cit* fn 89 at 15.

<sup>247</sup> The outcome may have been different had the daughter’s condition been life-threatening, as it may have supported the killing through compassion. S.Ost ‘Euthanasia and the Defence of Necessity: Advocating a More Appropriate Legal Response’ (2005) *Criminal Law Review* 355, at 366.

closeness of these terms that the courts have often interpreted proportionate force and reasonable force as being one and the same.<sup>248</sup> Indeed, this was the express approach taken by the Court of Appeal in the case of *Keane and McGrath*,<sup>249</sup> where the terms were used interchangeably, and the phrase ‘reasonable or proportionate’ appeared regularly throughout the judgement.

The case of *Palmer* emphasises the integral nature of proportionality to reasonable force in the statement that ‘*If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation*’.<sup>250</sup> This shows that proportionality is a logical requirement of self-defence, not only as evidence of reasonable force but also of necessary force. Proportionality is generally treated as a requirement of lawful self-defence,<sup>251</sup> and rightly so, as it indicates that the defender acted appropriately considering the competing harms at play,<sup>252</sup> and according to the circumstances. It provides a measure of reasonableness and necessity, and vice versa. Thus, it can be said that despite the separate assessments that they introduce, all the main components of self-defence are interrelated and interwoven. The overarching question is whether the force used was reasonable, and proportionality and necessity contribute towards finding the answer in each individual case. While proportionality is a requirement of reasonable force, it is important to note that it does not demand an unrealistically high standard by expecting actions to reach exact proportionality, as that in itself would go against the nature of self-defence as a natural, impulsive reaction to a threat or attack.

Sangero argues that proportionality and necessity should not be combined within an overall assessment of reasonable force, but should rather constitute separate requirements. He bases this approach on the importance of each factor and the need to

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<sup>248</sup> As highlighted by Elliott in her article C.Elliott ‘Interpreting the Contours of Self-defence within the Boundaries of the Rule of Law, the Common Law and Human Rights’, *op cit* fn 12 at 331.

<sup>249</sup> *R v Keane; R v McGrath* [2010] EWCA Crim 2514. For a discussion on the challenges of interpretation facing the courts since the householder provision introduced the potential for disproportionate force to be considered as reasonable force, see Elliott’s article, *ibid*.

<sup>250</sup> *R v Palmer op cit* fn 105, at 831.

<sup>251</sup> Apart from within the context of householder cases where disproportionate force may be permitted. See Chapter 4 for further discussion. Sangero strongly emphasises that proportionality is a crucial consideration. See B.Sangero *Self-Defence in Criminal Law*, *op cit* fn 73 at 141.

<sup>252</sup> S.Uniacke ‘Proportionality and Self-defense’ *op cit* fn 60 at 261.

avoid any weakening of the standards that they safeguard.<sup>253</sup> However, due to the similarities between each component and the way in which they complement and confirm each other, placing reasonable force as the overarching principle with proportionality and necessity forming required elements of reasonableness is logical, and brings clarity to the law. It enables a relatively straightforward direction to be given to the jury, that they must determine, based on the facts, whether reasonable force has been used, and in order to determine this, that they should consider whether the force was both necessary and proportionate in the circumstances.<sup>254</sup>

The issue of proportionality and excessive force will be developed further in the present Chapter when discussing the possession of offensive weapons, and the role that the relative power of the parties may play in self-defence.<sup>255</sup> Proportionality will also be a core theme in Chapter 4, as the new position relating to householders has eroded the condition from the law in this context.<sup>256</sup> While the general position of self-defence attaches significance to proportionality, the householder position allows disproportionate force to be used. When viewed solely in this respect, even without delving deeper into why this approach is problematic, it appears illogical.<sup>257</sup> Permitting anything up to gross disproportionality is dangerous and challenging to justify. Although self-defence has many justificatory theories, it is difficult to extend these to the new householder test, especially considering the fact that self-defence is a justificatory defence.

## **2.2 Theories that Justify Self-defence**

It is necessary to consider some of the different theories that seek to justify self-defensive actions, in order to fully understand the defence. It is not the main objective of this research to explore in depth the various theories that have been advanced to justify self-defence, but rather to set out briefly the most prominent of these theories,

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<sup>253</sup> B.Sangero *Self-Defence in Criminal Law*, *op cit* fn 73 at 146.

<sup>254</sup> *R v Palmer op cit* fn 105, at 832; *R v Shaw op cit* fn 133, at 19.

<sup>255</sup> For example, see section 2.3, pages 94-97.

<sup>256</sup> This reflects the arguments made by Lerner that attitudes towards proportionality have changed, and that there is a ‘*popular revolt against proportionality*’. R.L.Lerner ‘The Worldwide Popular Revolt against Proportionality in Self-defense Law’ (2006) 2 *Journal of Law, Economics and Policy* 331, at 334.

<sup>257</sup> A detailed discussion is provided in Chapter 4.

and the ones that are considered to be most relevant to the present study. In this respect, this section will explore the following theories: (i) rights and forfeiture; (ii) natural law; (iii) consequentialism; (iv) forced choice; (v) double effect; and (vi) individual autonomy. These theories provide explanations as to why it is permissible to act in self-defence, even when the action results in the aggressor's death.<sup>258</sup>

Self-defence is regarded as not only legally permissible but also morally acceptable. Despite the fact that '*most people believe that the deliberate and intentional killing of another person is generally morally wrong, many also believe that killing another person is sometimes morally justified and sometimes even called for*'.<sup>259</sup> Self-defence is one of these situations; it provides an exception to the general prohibition against killing. Circumstances giving rise to self-defence are special cases where although a usually punishable offence has been committed, criminal liability is set aside, as the conduct is not wrongful in this particular context. McMahan says

*'that there are occasions on which it is permissible intentionally to kill another person in self-defense is an axiom in contemporary ethical theory ... while we are confident that killing in self-defense is sometimes permissible, there is uncertainty about why this is an exception to the general prosecution of intentional killing'*.<sup>260</sup>

Many people feel strongly, not only that they should be permitted to use force to protect themselves, but that they also possess a 'right' to do so.<sup>261</sup> Whether or not such a 'right' exists will be questioned in this section.<sup>262</sup> Nevertheless, Leverick asserts that when it comes to justifying self-defence, there is a tendency to take the defence for granted, without attempting to explain why it constitutes a justified action

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<sup>258</sup> T.Kasachkoff, *op cit* fn 53 at 510; J.McMahan 'Self-defense and Culpability' (2005) 24(6) *Law and Philosophy* 751, at 763; G.P.Fletcher *Rethinking Criminal Law op cit* fn 70 at 858; J.Quong 'Killing in Self-defense' *op cit* fn 54 at 516-517.

<sup>259</sup> T.Kasachkoff, *op cit* fn 53 at 509.

<sup>260</sup> J.McMahan 'Self-Defense and the Problem of the Innocent Attacker' (1994) 104(2) *Ethics* 252, at 252.

<sup>261</sup> An example was the news coverage in 2011 following the then Justice Secretary Ken Clarke's statement that "*It's quite obvious that people are entitled to use whatever force is necessary to protect themselves and their homes*". BBC News, 'Right to Self-defence in Homes to be 'Much Clearer'', (29 June 2011), <<http://www.bbc.co.uk/news/uk-politics-13957587>> (accessed on 16/08/14). Uniacke also states that this is a common perception: '*most of us believe that we obviously have a right of self-defence*'. S.Uniacke *Permissible Killing: The Self-Defence Justification of Homicide, op cit* fn 8 at 6.

<sup>262</sup> See page 67.

that exempts criminal liability.<sup>263</sup> Although, *prima facie*, it may seem obvious why the defence is permitted because of its exceptional quality as an instinctive human reaction of self-preservation, upon closer examination, the justification is not easy to locate.<sup>264</sup> Despite the statement that ‘*self-defence is the clearest of all laws; and for this reason - the lawyers didn’t make it*’,<sup>265</sup> it is a considerably harder task than it seems to justify self-defence.

The defence is problematic because of the right to defend one’s life. This defensive right is derivative from the right to life, as evident in the self-defence exception in Article 2(2) of the ECHR.<sup>266</sup> All individuals, including those who pose a threat to the lives of others, possess the right to life. This is what complicates the matter, as usually every individual bears the same rights under the law, but for self-defence to be available, there inevitably must be an imbalance between the rights of the parties involved. For the defence to be accepted, the defender’s rights must have been prioritised over the aggressor’s. Thus, the first justificatory theory under examination is the rights and forfeiture theory, which provides an explanation for the competing rights of the defender and aggressor.

### **2.2.1 Rights and forfeiture theory**

According to Leverick<sup>267</sup> and Ashworth,<sup>268</sup> the most appropriate and convincing theory that explains why self-defence is justifiable is the rights theory. This theory focuses on an individual’s human rights, particularly the right to life. This right is arguably the most important<sup>269</sup> and fundamental of all the recognised human rights. It may be claimed that the reason for this is that the right to life is a prerequisite to the possession of all other rights.<sup>270</sup> In other words, without the protection of one’s life, it is impossible to possess any other right, thus making the denial of the right to life an

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<sup>263</sup> F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 43.

<sup>264</sup> The argument of self-preservation will be discussed shortly under the rights and forfeiture theory, and natural law theory, as the former is often said to derive from the latter.

<sup>265</sup> B.Sangero *Self-Defence in Criminal Law*, *op cit* fn 73 at 6.

<sup>266</sup> Discussed below in section 2.2.1.

<sup>267</sup> F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 54.

<sup>268</sup> A.Ashworth ‘Self-Defence and the Right to Life’, *op cit* fn 243 at 306.

<sup>269</sup> F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 55.

<sup>270</sup> The ethical theory of primary and secondary goods used by Paterson, and the status of life, is considered in further detail shortly.

irreparable injury. It is on this basis that a person is permitted to act in self-defence when faced with an unjust threat to one's life, and the right to life has gained protection in international conventions.<sup>271</sup>

Article 2 of the European Convention on Human Rights contains a provision that: *'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law'*.<sup>272</sup> There are exceptions to the general rule prohibiting the deprivation of life, and these are contained in Article 2(2):

*'Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection'*.<sup>273</sup>

This clearly includes lawful self-defence.

The rights theory operates as a justification to self-defence because in using lethal defensive force against an aggressor, the defendant is merely protecting his own right to life. Although this is at the expense of the aggressor's right to life, it is asserted by several authors such as Thomson,<sup>274</sup> Uniacke<sup>275</sup> and Leverick<sup>276</sup> that during the period of the attack, the aggressor temporarily forfeits his right to life, and thus his right not to be killed, by posing an unjust immediate threat to the life of another. It is important

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<sup>271</sup> Such as Article 2 of the European Convention on Human Rights (ECHR) 1950, (as incorporated into UK law through the implementation of the Human Rights Act 1998); Article 3 of the Universal Declaration of Human Rights 1948: *'Everyone has the right to life, liberty and security of person'*; and Article 6(1) of the International Covenant of Civil and Political Rights 1976: *'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'*. For a discussion of these instruments, see M.Bagaric 'So Which Rights are Real?' (2008) 4(3) *Original Law Review* 78, at 84-86.

<sup>272</sup> Wicks argues that the ECHR imposes obligations on the state to uphold the right to life's corollary duty not to kill, and that the *'right to life approach to justifying killing in self-defence is ... a viable approach. All members of society have a duty not to kill any other member of society and they have that duty because it co-exists with our individual rights to life'*. E.Wicks *The Right to Life and Conflicting Interests*, *op cit* fn 217 at 133.

<sup>273</sup> Article 2(2) of the European Convention on Human Rights 1950.

<sup>274</sup> J.J.Thomson 'Self-Defense' *op cit* fn 9.

<sup>275</sup> S.Uniacke *Permissible Killing: The Self-Defence Justification of Homicide*, *op cit* fn 8 at 191-193.

<sup>276</sup> F.Leverick 'Defending Self-defence', *op cit* fn 191 at 572.

to note that an aggressor only forfeits his right to life during the time he is posing a threat to the life of another; the moment he ceases to be a threat, the right to life is regained. Therefore, an individual who withdraws from his attack may not lawfully be killed, as this would not constitute self-defence; the defensive force would be excessive in such a circumstance, as it would no longer be necessary. It is important to stress this principle, as the language of forfeiture can be controversial due to its negative connotations of being a form of punishment.<sup>277</sup>

Dressler claims that '*forfeiture runs counter to the proposition that 'all human lives must be regarded as having an equal claim to preservation simply because life itself is an irreducible value'.*<sup>278</sup> The meaning of forfeit in this context does not refer to any imposition of a penalty; rather the meaning here is simply 'to lose'.<sup>279</sup> It may be that 'suspend' would be a more appropriate word to use in this context than 'forfeit', as it implies a temporary ceasing of something, and that it will be regained when certain conditions are met. Nevertheless, the literature mainly employs the word 'forfeiture', therefore the same will be applied here for consistency. Interestingly, despite Fletcher's disapproval and rejection of the idea of forfeiture back in 1979,<sup>280</sup> the theory is still developing and is widely used by many to this day. As no convincing and adequate alternative has been found, it seems likely that forfeiture will continue to be a compelling justification in the future.

However, due to the negative connotations of forfeiture, there is a need for theoretical justification. Perhaps the most obvious explanation is the fact that the aggressor is posing an immediate threat to the defender's life. Thomson has clarified that the reason it is permissible to use lethal defensive force in this context, is not the fact that without defensive action the defender will be killed by the aggressor, but rather that without defensive action, the aggressor will violate the defender's right not to be killed.<sup>281</sup> Uniacke believes that the right to life is a conditional right and is dependent

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<sup>277</sup> S.Uniacke *Permissible Killing: The Self-Defence Justification of Homicide*, *op cit* fn 8 at 194; M.Kremnitzer & K.Ghanayim 'Proportionality and the Aggressor's Culpability in Self-Defense' (2003-2004) 39 *Tulsa Law Review* 875, at 883.

<sup>278</sup> J.Dressler, *op cit* fn 16 at 271.

<sup>279</sup> F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 67.

<sup>280</sup> G.P.Fletcher 'The Right to Life' (1979) 13 *Georgia Law Review* 1371, at 1371.

<sup>281</sup> J.J.Thomson 'Self-Defense', *op cit* fn 9 at 308.



upon a person's conduct.<sup>282</sup> This supports the view that the permissibility of self-defence originates from the right not to be killed.<sup>283</sup> This conditional approach to rights is appropriate and means that the interest protected is potentially held by all people, providing they satisfy the necessary conditions.<sup>284</sup> For example, in relation to the right to life, it is possessed by all persons providing they do not pose an unlawful threat to the life of another.<sup>285</sup>

The possibility of forfeiting a right, inevitably invokes the discussion of the nature of the right that is possessed. This leads to a problem that is presented by the rights theory. Human rights are often referred to as unconditional or absolute rights.<sup>286</sup> Accordingly, they cannot be lost, or forfeited, providing the individual retains the status required in order to possess them.<sup>287</sup> This view of rights as absolute is incompatible with the approach taken by the rights theory in order to justify self-defence. The understanding of rights as absolute contrasts to the claim that the aggressor temporarily forfeits his right to life by virtue of the threat he presents to the defender. Therefore, it is argued here that an interpretation of the right to life as being absolute is misplaced and untenable.

Indeed, Wallerstein states that the idea of the right to life as an absolute, unconditional right must be abandoned, otherwise it is impossible to explain why and how it can be forfeited.<sup>288</sup> Similarly, Sangero claims that absolute rights are non-existent,<sup>289</sup> as does Bagaric who states that '*All rights can be violated in some circumstances*'.<sup>290</sup> This is a logical approach in respect of the right to life because it

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<sup>282</sup> S.Uniacke *Permissible Killing: The Self-Defence Justification of Homicide*, *op cit* fn 8 at 210.

<sup>283</sup> *ibid* at 178.

<sup>284</sup> M.Levin 'Conditional Rights' (1989) 55 *Philosophical Studies* 211, at 211.

<sup>285</sup> See page 63 for the circumstances in which the right to life may lawfully be deprived according to Article 2(2) of the ECHR 1950.

<sup>286</sup> 1 BI Comm 123. Blackstone described absolute rights as '*those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy whether out of society or in it*'.

<sup>287</sup> S.Uniacke *Permissible Killing: The Self-Defence Justification of Homicide*, *op cit* fn 8 at 195.

<sup>288</sup> S.Wallerstein 'Justifying the Right to Self-Defense: A Theory of Forced Consequences', *op cit* fn 56 at 1020. He provides two examples of how a conditional right may be operational: '*either by recognizing the conditional possession of an unspecified non-absolute right which depends on the actions (or the circumstance) of its owner, or by recognizing an absolute right of limited scope. The limitation can be defined by moral or factual specifications. Using the former method, the possession of the right is conditional; using the latter, the scope of the right is conditional*'.

<sup>289</sup> B.Sangero *Self-Defence in Criminal Law*, *op cit* fn 73 at 42.

<sup>290</sup> M.Bagaric 'So Which Rights are Real?', *op cit* fn 271 at 78.

explains why it is possible for rights to be withdrawn or suspended based on circumstances, whereas the unconditional argument reaches an impasse in this situation, as it cannot allow for any denial of the norm. Considering also that the law is fluid by nature, and is required to apply to a wide range of highly varied situations, the conditional approach furthermore appears more appropriate.

Indeed, even the Conventions that have been prepared to protect the right to life contain exceptions to the general prohibition of its deprivation. For example, Article 2(2) of the European Convention of Human Rights,<sup>291</sup> expressly states that there are situations when one's life may be lawfully taken without contravening the Convention right, of which self-defence is an example. Based on this, it is difficult to appreciate how the idea of an absolute right can be defended, as even the right to life, although widely regarded as the most fundamental of human rights, can potentially be lawfully denied in certain situations. An example of the non-absolute nature of the right is demonstrated in the field of medical law, as although a rare occurrence, one individual's right to life can be outweighed by another individual's right.<sup>292</sup> However, the prohibition of torture included in Article 3 of the ECHR may be considered an absolute right, as there are no derogations listed within the definition of the right. It is expressly stated that '*no one shall be subjected to torture or to inhuman or degrading treatment or punishment*'<sup>293</sup> without exception, thus such action can never be lawful.<sup>294</sup>

It is better to approach the matter as a balancing of competing rights, than to rely on the status of particular individual rights. It is therefore a logical conclusion, in order to explain the permissibility of self-defence under the rights theory that the aggressor's

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<sup>291</sup> See page 63.

<sup>292</sup> *Re A (Children)* *op cit* fn 86. As explained in Chapter 1, the introduction, this case involved the defence of necessity as a justification for the separation of conjoined twins, as the surgery would save the life of the stronger twin at the expense of her sister's life.

<sup>293</sup> Article 3 ECHR 1950.

<sup>294</sup> Liberty, *Article 3 No Torture, Inhuman or Degrading Treatment*, <<https://www.liberty-human-rights.org.uk/human-rights/what-are-human-rights/human-rights-act/article-3-no-torture-inhuman-or-degrading>> (accessed on 24/07/15). See Bagaric for a discussion on the possibility that on certain occasions, individual rights may be outweighed by emergency situations, for example those involving security matters. M.Bagaric 'So Which Rights are Real?', *op cit* fn 271 at 86.

right to life must be considered to be conditional on his actions. By posing a threat to the defender, he breaks the condition upon which it is held, thus forfeiting his right.<sup>295</sup>

This argument may also be appreciated from the opposite perspective namely that of the right not to be killed, which is implied in the right to life.<sup>296</sup> From this viewpoint, the right not to be killed derives from the right to life,<sup>297</sup> which consequently generates the right to act in self-defence when threatened. The following extract by Wallerstein summarises the nature of the dynamic between these interconnected rights:

*‘The notion of a right in rem is that it is the same kind of obligation, directed to indefinite and unidentified numbers of people. The right not to be killed is similar to all other basic rights, which are in rem, such as freedom of speech and freedom of religion. The construction of the right not to be killed and the derivative right to self-defense is a familiar one: a right in rem not to be killed which, if infringed by a specific individual, gives rise to a right in personam to self-defense’.*<sup>298</sup>

Therefore, it may be said that the right to self-defence is a derivative right, which originates from the fundamental right to life and the right not to be killed. This allows an initially general right to become a personal right against a specific individual.<sup>299</sup> Essentially, this means that individuals have a right not to suffer attacks on their lives, and when faced with such a situation, they can exert force against their aggressor without interfering with his rights.<sup>300</sup> The aggressor has both violated the defender’s

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<sup>295</sup> A.Gewirth ‘Are there any Absolute Rights?’ (1981) 31 *The Philosophical Quarterly* 122, at 1-2.

<sup>296</sup> Montague states that ‘*the right not to be killed and the obligation to refrain from killing are logically on a par, and, in fact, are the same concept viewed from two different standpoints*’. P.Montague ‘Self-Defence and Choosing between Lives’ (1981) 40(2) *Philosophical Studies: An International Journal for Philosophy in the Analytic* 207, at 208.

<sup>297</sup> An illustrative example arose in the case of *R (on the application of Burke) v General Medical Council* [2006] Q.B. 273. The case involved a claim for judicial review in relation to guidance by the GMC on the withholding and withdrawing of life prolonging treatment. B knew ultimately, that he would be reliant on artificial nutrition and hydration to keep him alive, due to the degenerative condition from which he was suffering. He wished to receive this treatment when the necessity arose, but feared that it would be denied. It was held that there was no basis for this fear, as a competent patient’s wishes to be kept alive through artificial nutrition and hydration would have to be respected. As the withholding of such treatment would be sure to kill B, this decision reflects that the right to life includes a corresponding right not to be killed.

<sup>298</sup> S.Wallerstein ‘Justifying the Right to Self-Defense: A Theory of Forced Consequences’, *op cit* fn 56 at 1020.

<sup>299</sup> J.J.Thomson ‘Self-Defense’, *op cit* fn 9 at 308.

<sup>300</sup> Kramer discusses the nature of rights, and explains that ‘*within the Hohfeldian analysis, the correlativity of right and duties is axiomatic; every duty is owed to a right-holder, and every right is held against a duty-bearer*’. M.H.Kramer ‘Legal and Moral Obligation’ in M.P.Golding & W.A.Edmundson (eds) *The Blackwell Guide to the Philosophy of Law and Legal Theory*, (Blackwell Publishing, Oxford, 2006), at 188.

right, and neglected his own duty not to kill. While every individual holds the right to life and right not to be killed equally, upon becoming an unjust threat to another person, the defender's rights outweigh the aggressor's. The defender is morally innocent, and his right has narrowed from a general right to a specific right to act at that point in time against the threat to his right to life, and natural right not to be killed.

Thus, it appears from the discussions so far, that the right to life is the only right of relevance to the rights and forfeiture theory. Indeed, there is a problem with the rights theory regarding whether or not the justification applies when self-defence has not resulted in the death of the aggressor. Does the right to life protect against lesser harms than the loss of life, namely any non-fatal injuries or injuries to one's autonomy?<sup>301</sup> Herring claims that it does not as '*Article 2 is not relevant in cases of non-deadly force*'.<sup>302</sup> Nevertheless, this does not necessarily mean that the rights theory is obsolete in this particular context, as other human rights could permit self-defence in situations where non-fatal force has been used.<sup>303</sup> Articles 3,<sup>304</sup> 5,<sup>305</sup> and 8<sup>306</sup> of the ECHR may be relevant, as they safeguard against interferences to one's autonomy, physical and moral integrity.<sup>307</sup> Therefore, although self-defence is often considered to be a corollary of the right to life, as the right not to be killed, it may also derive from other rights in situations where death has not occurred.

The possession of a right usually requires one to be able to take steps to protect that right, but as Ryan highlights, '*there are limits to the actions one may take*'.<sup>308</sup> A person acting in self-defence must act in accordance with the ordinary standards

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<sup>301</sup> An example of such a harm is rape, which although the victim retains their life, it will have been altered forever. This presents a grave intrusion of an individual's autonomy, and a degradation or devaluation of their life. See, M.Bagaric 'Rich Offender, Poor Offender: why it (Sometimes) Matters in Sentencing' (2015) 33(1) *Law and Inequality* 1, at 39.

<sup>302</sup> J.Herring *Criminal Law: Text, Cases, and Materials*, op cit fn 135 at 651.

<sup>303</sup> A.Ashworth & J.Horder, op cit fn 18 at 118. Ashworth and Horder assert that the problem with these other human rights is that they do not contain explicit exceptions of self-defence, so the courts have had to imply such exceptions. They refer by way of examples to *Rivas v France* [2005] Crim LR 305 and *RJ and M-J D v France* [2005] Crim LR 307.

<sup>304</sup> Article 3 ECHR 1950 - '*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*'.

<sup>305</sup> Article 5 ECHR 1950 - '*Everyone has the right to liberty and security of person*'.

<sup>306</sup> Article 8(1) ECHR 1950 - '*Everyone has the right to respect for his private and family life, his home and his correspondence*'.

<sup>307</sup> J.Herring *Criminal Law: Text, Cases, and Materials*, op cit fn 135 at 651.

<sup>308</sup> C.C.Ryan 'Self-Defense, Pacifism, and the Possibility of Killing' (1983) 93(3) *Ethics* 508, at 514.

required, and may only do what is considered reasonable.<sup>309</sup> It is important to remember what Beale notes of the protection of legal rights, that '*the law does not ordinarily secure the enjoyment of rights, it grants redress for a violation of rights*'.<sup>310</sup> Therefore, care must be taken when considering the rights theory to ensure that it is not misinterpreted as a provision allowing individuals to take the law into their own hands. Indeed, this is why the conditions of necessity and proportionality are requirements of reasonable force, in order for self-defensive actions to be lawful.

It is notable that the rights approach to the justification of self-defence compliments the requirements of reasonable force.

*'Rights function to protect persons from being used simply as a mean to the ends of others. But if the possession of rights can be conditional on the observance of relevant moral requirements, and in particular on respecting the rights of others, then it is natural to think that rights can be forfeited in precisely this way: by transgressing a relevant moral requirement, a person can become liable to be harmed as a means to preventing or remedying that very transgression. Necessity and proportionality therefore follow as necessary components of liability'*.<sup>311</sup>

The law has developed these tests in line with the morally right action to take. Inflicting harm in order to avoid suffering harm is an acceptable intention, and the intention with which one acts is very important in this context.<sup>312</sup>

It may be argued that the rights and forfeiture theory is incompatible with the important ethical principle of the sanctity of life. This principle reflects that all lives are accorded equal value, while any case of self-defence justified by the forfeiture of the aggressor's rights involves a prioritisation of one life over another. However, as the forfeiture of the right to life is merely temporary, and is regained as soon as the aggressor ceases to pose an unlawful threat to the defender's life, the theory acknowledges the severity of the circumstances for both parties. Thus, by permitting only temporary suspension of rights, it does not disrespect the sanctity principle. It is difficult to reconcile this argument with Kadish's statement that '*the life of the good*

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<sup>309</sup> This of course refers to the requirement that no more than reasonable force should be used in self-defence, which incorporates necessity and proportionality.

<sup>310</sup> J.H.Jr.Beale 'Retreat from a Murderous Assault', *op cit* fn 183 at 581.

<sup>311</sup> D.Rodin 'Justifying Harm', *op cit* fn 150 at 77.

<sup>312</sup> *ibid* at 93.

*man and the bad stand equal, because how a man has led his life may not affect his claim to continued life*'.<sup>313</sup> This suggests that the aggressor's behaviour is an insufficient reason to justify taking his life. However, the rights and forfeiture account is not based on blameworthiness, rather it pivots on the defender's right not to be killed. As the rights being balanced are equal,<sup>314</sup> it is necessary to find a distinguishing feature. The difference between the parties is undeniable - the defender is not responsible for the circumstances while the aggressor is responsible. The potential unfairness of the rights justification towards the aggressor is mitigated by the fact that his rights are merely suspended during the period in which he poses an unjust threat to the life of another. This means that although the aggressor has committed a wrong, his interests are also protected.

While the rights theory is arguably the most compelling theory individually, this approach is problematic in that it involves the temporary forfeiture by the aggressor of his human rights. Despite not being the perfect solution, the rights theory has many benefits and explains difficult situations successfully.<sup>315</sup> The theory's strength derives from being based not on the aggressor's wrongdoing, but rather on the defender's right to life, to preserve one's life against the threat against oneself.<sup>316</sup> Despite its relative controversy, as will become evident, when this theory is viewed in accordance with the other theories, it is tenable as it does not seem to be contrary to conventional morality.<sup>317</sup> Indeed, several other theories bear similarities and connections to the rights forfeiture account, such as natural law theory.

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<sup>313</sup> S.H.Kadish, *op cit* fn 180 at 880.

<sup>314</sup> The defender's right to life against the aggressor's right to life.

<sup>315</sup> F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 67.

<sup>316</sup> S.H.Kadish, *op cit* fn 180, at 885.

<sup>317</sup> The meaning intended by the use of the term 'conventional morality' here, is the same as that used by Wasserman, namely the '*conformity to appropriate moral norms*'. D.Wasserman 'When Bad People do Good Things: will Moral Enhancement Make the World a Better Place?' (2014) 40(6) *J Med Ethics* 374, at 374. It pertains to the notion that morality is capable of a degree of universality, more so than law, which changes according to particular societies. The truth of this premise is nevertheless unconfirmed, as although morality refers to values or goods that ought to be pursued, there is disagreement over which values in particular should be pursued, both on an individual and collective basis. T.Honoré 'The Dependence of Morality on Law' (1993) 13 *Oxford Journal of Legal Studies* 1, at 1, 5 and 12.

### 2.2.2 Natural Law

The theory of natural law is closely connected to that of rights theory, as the right to life in particular may be said to derive from nature. This prioritisation of life means that self-defence is a defence that is recognised in conceptions of natural law which highlight the preservation of life. There are many different strands of natural law, and ‘*Natural law theory*’ is a label that has been applied to theories of ethics, theories of politics, theories of civil law, and theories of religious morality’.<sup>318</sup> This section draws upon natural law as a theory of law,<sup>319</sup> and briefly summarises some of the most notable strands within the legal tradition.<sup>320</sup>

According to D’Entrèves, the best general description of natural law is that it provides a title to the ‘*point of intersection between law and morals*’.<sup>321</sup> Broadly, the theory indicates that law both depends upon, and partly derives from moral norms, which are not only universally acceptable and applicable, but are also located in nature.<sup>322</sup> Freeman explains that the claim to the existence of universal ethical principles is based upon the fact that all people, in all societies, are capable of having knowledge of these values and living according to them, as they are discoverable by reasoning about human good.<sup>323</sup>

The ancient Greeks probably provide the earliest delineation of natural law theory, as its philosophy ‘*has deep roots in the classical Greek conception of the universe as normatively ordered*’.<sup>324</sup> This is evident in both Plato and Aristotle’s search for a truth

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<sup>318</sup> M.Murphy ‘The Natural Law Tradition in Ethics’ in E.N.Zalta (ed), *The Stanford Encyclopedia of Philosophy*, (Winter 2011 Edn), <<http://plato.stanford.edu/archives/win2011/entries/natural-law-ethics/>> (accessed on 24/07/15).

<sup>319</sup> J.Finnis ‘Natural Law Theories’ in E.N.Zalta (ed), *The Stanford Encyclopedia of Philosophy*, (Fall 2014 Edn), <http://plato.stanford.edu/archives/fall2014/entries/natural-law-theories/> (accessed on 24/07/15).

<sup>320</sup> A full exploration of the many and varied approaches of natural law over the years is unfortunately beyond the scope of this thesis. Indeed, as D’Entrèves stated, the compilation of the ‘*history of natural law is a formidable undertaking*’. A.P.D’Entrèves *Natural Law: An Introduction to Legal Philosophy*, (Hutchinson & Co Publishers Ltd, London, 1967), at 8.

<sup>321</sup> *ibid*, at 116.

<sup>322</sup> K.Greenawalt *Conflicts of Law and Morality*, (Clarendon Press, Oxford, 1989), at 161.

<sup>323</sup> M.D.A.Freeman *Lloyd’s Introduction to Jurisprudence*, (Sweet & Maxwell, London, 2008), at 84. See also, C.Paterson, *op cit* fn 21 at 4. According to Paterson, these values provide an objective guide to our quest to make moral decisions, as opposed to our emotional state of mind, which is purely subjective in nature.

<sup>324</sup> L.I.L.Weinreb ‘The Moral Point of View’ in R.P.George (ed) *Natural Law, Liberalism and Morality*, (Oxford University Press, Oxford, 2006), at 200.

existing and residing in nature.<sup>325</sup> The concept of self-preservation in particular can be traced back to the ancient Greeks and the belief that certain relationships involved the existence of natural rights and duties, and that ‘*the right of self-defense was equally located in nature*’.<sup>326</sup> The philosophy that is advanced here is that things follow pre-determined paths according to their nature, which determines their place in the world and their natural ends.<sup>327</sup> The theory evidently has a long tradition and according to Freeman ‘*Until the Stoics “nature” had meant “the order of things”; with them it came to be identified with man’s reason. When man lived according to “reason” he was living “naturally”. To the Stoics precepts of reason had universal force*’.<sup>328</sup> This notion of natural law advances the idea that there are universal moral standards that all people are capable of discovering.

The next influential stage in the history of natural law is the role of the Roman Stoic philosophers, such as Cicero, Seneca, and Marcus Aurelius. Their logic was that law is a method of distinguishing between right and wrong, or what is regarded as just or unjust actions, and is a product of nature which is aimed at protecting the good in society while penalising the evil.<sup>329</sup>

However, the classical and perhaps most well-known view of natural law theory is that developed by Saint Thomas Aquinas, based on Christianity, specifically Roman Catholicism. Aquinas stated that ‘*The natural law is promulgated by the very fact that God instilled it into man's mind so as to be known by him naturally*’.<sup>330</sup> Despite the perception that all humans know the difference between right and wrong, a legal structure of rules is required in order to counter the presence of evil that exists within men.<sup>331</sup> Due to the fact that people do not always act righteously, in accordance with

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<sup>325</sup> W.Morrison *Jurisprudence: from the Greeks to Post-modernism*, (Cavendish Publishing Ltd, London, 1998), at 26.

<sup>326</sup> J.K.Kelly *A Short History of Western Legal Theory*, (Oxford University Press, New York, 1992), at 21.

<sup>327</sup> W.B.Le Roux ‘Natural Law Theories’ in C.Roederer & D.Moellendorf *Jurisprudence*, (Juta & Company Ltd, Lansdowne, 2007), at 32-33.

<sup>328</sup> M.D.A.Freeman *Lloyd’s Introduction to Jurisprudence*, *op cit* fn 323 at 98.

<sup>329</sup> R.Nobles & D.Schiff ‘The Evolution of Natural Law’ in J.Penner D.Schiff & R.Nobles (eds) *Jurisprudence and Legal Theory: Commentary and Materials*, (Butterworths LexisNexis, London, 2002), at 50.

<sup>330</sup> St.T.Aquinas *Summa Theologica*, (Fathers of the English Dominican Province trs, Benziger Bros., New York, 1947), at 1332.

<sup>331</sup> R.Nobles & D.Schiff ‘The Evolution of Natural Law’ *op cit* fn 329 at 65.



morality and the law, defences such as self-defence are crucial to provide fairness and justice within society.

It is problematic to rely on a religious base alone for the theory,<sup>332</sup> and Hugo De Groot (Grotius)<sup>333</sup> has been ascribed with the responsibility of secularising natural law theory.<sup>334</sup> Following his philosophy it is no longer necessary to conform to a particular religion to be an advocate of natural law.<sup>335</sup> In Moore's opinion '*it is good to be without God as we seek to vindicate any belief in the objectivity of morals, for we don't need him in this task*',<sup>336</sup> which supports the fact that natural law can exist independently of its religious connotations. As natural law is self-evident, there is no need to base its tenets on the existence of God.<sup>337</sup>

This view of law as being tied to morality distinguishes the tradition of natural law from other theoretical traditions. Notably, natural law is often compared to positivism. Positivism considers ethics and morals to be separate and distinct from the law, and hence unnecessary to the foundation of law. There is an emphasis upon law as a science, and the importance of obedience and command are notable characteristics of its philosophy which is reflected in the phrase 'law is law'.<sup>338</sup> Kroeze interestingly notes that '*It is not often that a theory of law can be said to suffer from 'bad press', but that is the case with positivism*'.<sup>339</sup> Its 'bad press' may be attested to its persistence that once a law is made, its validity is not affected even if it is considered to be immoral.<sup>340</sup> The problem is that positivism is considered accountable for rigid interpretations of the law in court rooms by the judiciary, and the theory has been

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<sup>332</sup> C.Paterson, *op cit* fn 21 at 41.

<sup>333</sup> For example, he asserts that certain positions would be the same whether God exists or not: '*the Law of Nature is so unalterable, that God himself cannot change it ... God himself cannot effect, that twice two should not be four; so neither can he, that what is intrinsically Evil should not be Evil*'. H.Grotius (1625), *The Rights of War and Peace*, (R.Tuck (ed), Liberty Fund, Indianapolis, 2005), at 155.

<sup>334</sup> R.Wacks *Understanding Jurisprudence: An Introduction to Legal Theory*, (2nd edn, Oxford University Press, New York, 2009), at 20.

<sup>335</sup> I.Mcleod *Legal Theory*, (3rd edn, Palgrave Macmillan, Hampshire, 2005), at 56.

<sup>336</sup> M.S.Moore 'Good without God' in George, R. P. (ed) *Natural Law, Liberalism and Morality*, (Oxford University Press, Oxford, 2006), at 221.

<sup>337</sup> A.P.D'Entrèves, *op cit* fn 320 at 53.

<sup>338</sup> *ibid* at 65; and B.H.Bix 'Legal Positivism' in M.P.Golding & W.A.Edmundson (eds) *The Blackwell Guide to the Philosophy of Law and Legal Theory*, (Blackwell Publishing, Oxford, 2006), at 32.

<sup>339</sup> I.J.Kroeze, *op cit* fn 188 at 62-63.

<sup>340</sup> M.D.A.Freeman *Lloyd's Introduction to Jurisprudence*, *op cit* fn 323 at 44.

blamed for ‘*the ‘mechanical and wooden’ interpretation of statutes by the courts*’.<sup>341</sup> Therefore, for the purposes of this research, positivism is too rigid in its application of the law to be used to question the law and its effectiveness,<sup>342</sup> or to observe to what degree it should be extended, and to explore whether offences of possessing offensive weapons should be covered by the defence of self-defence. On the other hand, natural law theory is adaptable and flexible, and is designed in a way that facilitates moral questioning and reasoning within the context of legal study. Indeed, aspects of natural law theory remain pertinent and useful in a modern, secular society.<sup>343</sup> For example, Hsiao adopts the theory to support his proposition that the natural right to life gives rise to a natural right to bear arms.<sup>344</sup>

An important principle of the modern tenets of natural law is the emphasis placed upon the preservation of life.<sup>345</sup> The principle that good is to be done, and life is to be preserved at all times is the strand of natural law that is considered useful to the present research. As will be seen shortly with reference to Finnis, it forms part of the modern formulation of the theory.<sup>346</sup> Self-preservation is a principle prioritising personal security, and Blackstone prioritised this as a natural right, stating that it encompasses an individual’s ‘*legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation*’.<sup>347</sup> The destruction of life and evil is to be avoided, and everything that achieves these goals is encompassed within the theory.<sup>348</sup> This natural law account considers the autonomy of the individual to be vital. In the words of Hobbes ‘*jus naturale, is the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature; that is to say, of his own life*’.<sup>349</sup> Therefore, the right to self-defence is highly valued: ‘*the sum of the right to*

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<sup>341</sup> I.J.Kroeze, *op cit* fn 188 at 74-75.

<sup>342</sup> Its rigidity is reflected in its perception of law as unquestionable.

<sup>343</sup> R.Wacks *Understanding Jurisprudence: An Introduction to Legal Theory*, *op cit* fn 334, at 20. See its use for example in the context of medical ethics in Paterson’s book: C.Paterson, *op cit* fn 21. However, Crowe suggests that the theory requires ‘reinvigoration’. J.Crowe ‘Natural Law in Jurisprudence and Politics’ (2007) 27(4) *Oxford Journal of Legal Studies* 775, at 775.

<sup>344</sup> T.Hsiao ‘Bearing Arms in Self-defense: a Natural Law Perspective’ (2013) 25 *Journal on Firearms & Public Policy* 114, at 114.

<sup>345</sup> M.D.A.Freeman *Lloyd’s Introduction to Jurisprudence*, *op cit* fn 323 at 106.

<sup>346</sup> See below on page 75 for a discussion on Finnis.

<sup>347</sup> 1 *BI Comm* 129.

<sup>348</sup> R.Nobles & D.Schiff ‘The Evolution of Natural Law’, *op cit* fn 329 at 56.

<sup>349</sup> T.Hobbes ‘Leviathan: Chapter XIV: Of the First and Second Natural Laws, and of Contracts’ in S.M.Cahn & P.Markie (eds), *Ethics: History, Theory, and Contemporary Issues*, (3rd edn, Oxford University Press, New York, 2006), at 223.

*nature; which is, by all means we can, to defend ourselves*'.<sup>350</sup> This theory gives self-defence a privileged status as a significant right that is not only recognised in law, but also exists in nature, and is therefore morally grounded. It is notable that natural law accepts that there are exceptions to general moral norms, for example killing, as although killing is clearly a serious wrong, it may be just if it results from an act of self-preservation or self-defence. As Golding notes, '*Although natural law prohibits immoral actions that cause harm to other human beings, it is not 'necessarily contrary to natural law to kill in self-defense*'.<sup>351</sup>

This is so despite the status of life as a necessary good in order to lead the 'good life'. This concept is attributed to Finnis, and life is the first good to be listed in his view of the '*basic forms of human flourishing*'.<sup>352</sup> Similarly, Paterson refers to life as a primary good, in the context of his work on assisted suicide and euthanasia.<sup>353</sup> He explains that primary goods are those entities that are '*the very purposes or goals in life that ultimately inform and shape the content of all worthwhile human action*'.<sup>354</sup> The value of life is not only evident in its status as a primary good, but also in the fact that it is necessary in order to enjoy any of the other primary and secondary goods.<sup>355</sup>

In light of this theory demonstrating the value of life, causing death in self-defence appears contestable. However, in the context of self-defence, the action of avoiding death (harm to the defender) by causing injury or death to another (harm to the aggressor) is permissible. Within the context of the injury or damage suffered by the aggressor, the lawful circumstances mitigate the general principles relating to harm.<sup>356</sup> Generally, harm involves the commission of wrongful acts, but cases of self-defence fall outside the norm as the action is justified, even if it causes the death of the aggressor. This is not to say that no harm has occurred as a matter of fact, but rather,

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<sup>350</sup> *ibid* at 223-224.

<sup>351</sup> M.P.Golding *Philosophy of Law*, (Prentice-Hall Inc, New Jersey, 1975), at 32.

<sup>352</sup> J.Finnis *Natural Law and Natural Rights*, (Clarendon Press, Oxford, 1980), at 23; J.Finnis 'Natural Law and Legal Reasoning' (1990) 38 *Cleveland State Law Review* 1, at 1-2. For discussion, see also R.Wacks *Philosophy of Law: A Very Short Introduction*, Oxford University Press, 2006, at 14; and A.E.Wallin 'John Finnis's Natural Law Theory and a Critique of the Incommensurable Nature of Basic Goods' (2012) 35(1) *Campbell Law Review* 59, at 70-71.

<sup>353</sup> C.Paterson, *op cit* fn 21 at 50.

<sup>354</sup> *ibid*.

<sup>355</sup> *ibid* at 51.

<sup>356</sup> J.Feinberg, *op cit* fn 58 at 81-82.

that the harm has eventuated in special circumstances in which it is considered justified.

The concept of self-preservation is especially pertinent to this research, as it provides a direct connection between natural law theory and self-defence. Uniacke has explored this relationship between self-defence and natural law, and claims that the former derives from the latter.<sup>357</sup> She refers to the moral permission of self-defence and the different justifications for allowing the defence. The varying degrees of these justifications range from the belief that legitimacy originates merely from the just intention of self-preservation; to the belief that self-defence is a moral and legal 'right'; to the more extreme contention that there is a 'duty' to preserve life.<sup>358</sup> These suggestions create a wide scale of what is considered acceptable, from merely being allowed to protect oneself, to having a 'right' of self-preservation, to being under a duty to act defensively. Such reasoning about a duty to act in self-defence is antiquated, and alludes to a period when individuals were expected to keep arms in order to assist the state with peacekeeping.<sup>359</sup> This duty is unlikely to be accepted in modern times due to the institutionalisation of law enforcement bodies, and the strengthened role of the state to protect its citizens.<sup>360</sup> However, she claims that it is a moral right, that individuals may prefer their own lives over their aggressor's, and that others are permitted to assist the defender to protect himself, are relevant and justify the defence of self-defence.

Indeed, self-preservation also creates a strong link between natural law and the right to life. This is evident in Ashworth's assertion that the right to life, to physical security, *'may be described as "natural" and "absolute" in the sense that reason demands its recognition if men are to live together in society, and in the sense that the instinct towards self-preservation is so strong and basic to human nature that "no law can oblige a man to abandon" it'*.<sup>361</sup> Therefore, in order to protect the right to life, the right to use defensive force must also be permitted, and a defence of self-defence must be available.

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<sup>357</sup> S.Uniacke 'Self-Defence and Natural Law' *op cit* fn 163 at 73-74.

<sup>358</sup> *ibid.*

<sup>359</sup> J.L.Malcolm *Guns and Violence: The English Experience*, (Harvard University Press, Massachusetts, 2002), at 4, 45 and 47.

<sup>360</sup> M.Kremnitzer & K.Ghanayim, *op cit* fn 277 at 899.

<sup>361</sup> A.Ashworth 'Self-Defence and the Right to Life', *op cit* fn 243 at 282.

It is apt to refer to Locke's philosophy on the state of war, that a human life is to be preserved as far as is possible as the fundamental law of nature demands '*when all cannot be preserved, the safety of the innocent is to be preferred; and one may destroy a man who makes war upon him*'.<sup>362</sup> He compares the aggressor to a 'beast of prey,' an analogy indicating predatory, dangerous, cruel, and ruthlessness in the aggressor's treatment of his fellow man.<sup>363</sup> Thus, on a basic evaluation, by his nature and actions, the aggressor devalues his own life by posing an unjust threat to the life of another, and as a result loses some of the rights otherwise awarded to him. There is a similarity here to the rights and forfeiture account, providing additional support and justification for the theory. Due to the offensive actions of aggressors, they lack status as moral beings as they have transgressed expected behavioural norms, thus placing them in a position of moral weakness in comparison with their victim. In attacking their prey, 'beasts of prey' willingly place themselves in a position of risk and danger. They act according to their nature for survival, as does their prey, which will fight back where possible. The risk is knowingly undertaken, and the beast may suffer an injury or fatal blow. When transferring this analysis to the context of aggressors and defenders in cases of self-defence, the main point to draw from the reference to beasts is that the preservation of human life is paramount and that by exerting violence upon another human being, the aggressor's transgression means that violence may lawfully be used against him.<sup>364</sup> The wrongfulness of the aggressor's action attracts such significant moral disapproval that it outweighs his general right of self-preservation. The defender's right to preserve one's life becomes paramount. Therefore, the natural law account of self-defence applied here asserts that the defence is morally permissible as it is founded in nature itself.<sup>365</sup> Accordingly, any harm caused to the

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<sup>362</sup> J.Locke *The Second Treatise of Government and a Letter Concerning Toleration*, (Basil Blackwell, Oxford, 1948), at 10.

<sup>363</sup> T.Pink *Free Will: A Very Short Introduction*, (Oxford University Press, New York, 2004), at 4. Humans are contrasted in nature from the lower animals by their ability to control their lives independently from nature.

<sup>364</sup> G.Forster *Starting with Locke*, (Continuum International Publishing Group, London, 2011), at 99.

<sup>365</sup> For example, Aquinas argued that self-defence is permissible, stating: '*Since one's intention is to save one's own life, is not unlawful, seeing that it is natural to everything to keep itself in "being," as far as possible. And yet, though proceeding from a good intention, an act may be rendered unlawful, if it be out of proportion to the end. Wherefore if a man, in self-defense, uses more than necessary violence, it will be unlawful: whereas if he repel force with moderation his defense will be lawful*'. St.T.Aquinas *Summa Theologica*, op cit fn 330 at 1961.

aggressor is his own doing because his actions place him outside the general protection of both law and morality.<sup>366</sup>

Natural law does not necessarily constitute a separate theory of justification, as it bears similarities to the other theories discussed. Rather, it can be seen as providing more of a framework and credibility for the study, as opposed to a distinct justificatory theory in its own right. The significant preference ascribed to self-preservation, provides a foundation and basis for the claims of the other theories discussed here, including the following theory of consequentialism.

### **2.2.3 Consequentialism**

The former discussion leads onto the next theory, namely consequentialism, as it sets out the contention that the aggressor's actions create his fate. The consequentialist approach weighs the consequences of the offensive and defensive actions against each other. It involves an assessment of which consequence produces the 'greatest happiness'. An example of the theory is utilitarianism which seeks to maximize happiness to the greatest number of people.<sup>367</sup> Alternatively, and pertinent to the consideration of self-defence, it does not necessarily need to involve a significant amount of people before happiness can be maximised.<sup>368</sup> Often self-defence involves an aggressor and a defender, therefore the analysis is of the consequences of the loss of one life or another, as opposed to one life or several lives. Despite the absence of unequal consequences to be balanced, permitting the defender's use of force is the greatest good in this situation, for the individual defender, and for the social legal order.

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<sup>366</sup> This reasoning is akin to that applied in Lon Fuller's famous non-fictional work on the explorers trapped in a cave, who agree to the sacrifice of one for the survival of the others through cannibalism, and the victim was the individual who suggested the solution. L.L.Fuller 'The Case of the Speluncean Explorers' (1948-1949) 62 *Harvard Law Review* 616, at 621-622.

<sup>367</sup> J.Driver, *op cit* fn 188.

<sup>368</sup> However, it is perhaps more commonly advanced when the consequences present a clear disparity between the competing numbers. For example, with rationing decisions in relation to finite healthcare resources, it is sometimes discussed whether funding an expensive drug that could cure one person is cost effective in comparison to funding a less expensive drug that will merely alleviate their suffering, while allowing additional funds to be spent on treating several other individuals. Another example, also from the healthcare profession, is the comparison between extending the life of one elderly patient and the treatment of several newborn babies, or young children. For discussion on this, see J.Herring *Medical Law and Ethics*, (4th ed, Oxford University Press, Oxford, 2012), at 82.

In assessing self-defence, the consequentialist conclusion is that it is preferable for the aggressor's life to be lost, than that of the innocent victim, who merely responds to the attack by using force in defensive action.<sup>369</sup> On an analysis based on the consequences alone,<sup>370</sup> this is the clear outcome to be supported. Kadish states that '*when the choice is between the life of the victim and the life of his assailant, the answer is unambiguous in every legal system: the victim may kill to save his own life*'.<sup>371</sup> This is a strong view concerning the fact that the interests of the defender to protect himself and preserve his own life outweigh the aggressor's life. This view is underpinned and justified by the notion of a right to resist aggression,<sup>372</sup> which represents the greatest good in the circumstances.

Similarly, Fletcher states that '*an aggressor killed in self-defence ... is not a relevant invasion of protected legal interest*',<sup>373</sup> as the action is justified according to the circumstances. One may say that the aggressor has placed himself in a position of moral weakness compared to the defender, and because of this aggressive, immoral behaviour, the aggressor's own life is accorded lesser value. What is meant by the term 'moral weakness' is that the aggressor is subject to an increased level of moral scrutiny. His actions have attracted great disapproval as a result of their wrongfulness, and thus render him less worthy of moral protection than one who has not acted offensively. This reasoning supports the tenets of consequentialism because it indicates that the preferred consequence is that harm be caused to the aggressor and not the defender. By agreeing with this view, we are effectively saying that when looking at self-defence, the exercise undertaken is the comparison of the interests of the individuals involved. Accordingly, the right to kill in self-defence is founded upon the fact that a choice between lives must be made, that of the aggressor and the

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<sup>369</sup> F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 46 and 49. Leverick states that '*Consequentialist theories of self-defence have been praised for the fact that they justify conduct that results in the least harm: both in terms of protection of human life and the minimization of the overall amount of societal violence*' (at 49).

<sup>370</sup> W.Sinnott-Armstrong 'Consequentialism' in E.N.Zalta (ed), *The Stanford Encyclopedia of Philosophy*, (Spring 2014 Edn), <<http://plato.stanford.edu/archives/spr2014/entries/consequentialism/>> (accessed on 27/07/15).

<sup>371</sup> S.H.Kadish, *op cit* fn 180 at 881.

<sup>372</sup> The approach advanced by Kadish was the subject of an article by Ferzan. She highlights that for Kadish, the right to resist aggression is held by individuals against the State, and that this forms the basis of self-defence. K.K.Ferzan 'Self-defence and the State' (2007-2008) 5 *Ohio State Journal of Criminal Law* 449, at 450 and 453.

<sup>373</sup> G.P.Fletcher 'The Nature of Justification' in S.Shute J.Gardner & J.Horder (eds), *Action and Value in Criminal Law*, (Clarendon Press, Oxford, 1993), at 178.

victim, and that the latter is to be preferred by virtue of his innocence in the circumstances.<sup>374</sup>

Assessing the circumstances in this manner is an example of weighing a choice of evils. The ‘lesser of two evils’ account is more commonly used when dealing with the defence of necessity,<sup>375</sup> but it is still worth mentioning in this context of consequential thought as a possible justification for self-defence.<sup>376</sup> Essentially, what this theory advances is that where there are two inevitable evils about to occur, (in this context an unlawful attack on an innocent person or the use of defensive force), the lesser evil is to be preferred. Therefore, the defensive action is permissible as the lesser harm. Within the context of self-defence, this argument holds that the defender’s life should be protected, as he is an innocent person who is subjected to an unjust attack. The defender’s life is protected by permitting the lesser harm/evil, that is, the infliction of defensive force on the aggressor in order to prevent the attack on the defender from succeeding. Both outcomes are a form of evil, either an innocent individual will be attacked, or the aggressor will be injured or killed in order to repel the offensive use of force. The greater harm is the former, that of the defender suffering an injury or being killed. The lesser harm is an infliction of injury or the killing of the aggressor through the use of defensive force. This argument entitles the victim to claim that the offence he committed ‘*was necessary to prevent greater harm from occurring*’.<sup>377</sup>

Leverick states that consequentialist theories are commendable in that they prioritise the outcome that causes the smallest harm in a certain scenario, the focus therefore being on the most just result in the situation.<sup>378</sup> Despite this positive feature of the theory, it is problematic that ‘*to judge an action purely on the basis of its consequences is to neglect issues of individual rights and justice*’,<sup>379</sup> potentially resulting in a grave injustice to an individual, purely as one person’s suffering is considered a lesser harm than the suffering of another. This assessment of

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<sup>374</sup> This choice between lives is explored further in section 2.2.4.

<sup>375</sup> The difference between the defence of self-defence, necessity, and duress was discussed above, see fn 110.

<sup>376</sup> B.Sangero Self-Defence in Criminal Law, *op cit* fn 73 at 73-75.

<sup>377</sup> A.Noti ‘The Uplifted Knife: Morality, Justification, and the Choice of Evils Doctrine’ (2003) 78 *New York University Law Review* 1859, at 1859.

<sup>378</sup> F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 49.

<sup>379</sup> *ibid.*



consequences is similar to the prioritization of self-preservation in natural law theory. However, it differs as it places the focus upon the weighing of consequences as good or bad outcomes, as opposed to justifying the defender's preference of his own life over that of his aggressor's.

Arguably, this approach bears a similarity to the principle in the law of tort, that '*where a loss has been incurred, between two innocents the causer pays*'.<sup>380</sup> Considered in relation to self-defence, where usually only one party is innocent while the other is acting unlawfully, this principle would support the justification of the defender's action. Thus, the guilt and blameworthiness of the aggressor would render any defensive force exerted against him acceptable, as he is responsible for the need to resort to such action in the first place.<sup>381</sup> The defender is thus favoured over the aggressor, because of the latter's moral fault,<sup>382</sup> as the reasons for acting defensively are perfectly moral. A balancing of good and bad outcomes is therefore similarly achieved.

This analysis considers the consequences in light of the fact that the aggressor has forced a choice of lives situation, his own and that of the defender, and evaluates which consequence should be preferred. It is attractive in that it gives preference to the least morally harmful outcome.<sup>383</sup> However, the danger with the argument of consequentialism, is that it focuses too much on the blameworthiness of the aggressor.<sup>384</sup> This could create the misleading impression of self-defence as a form of punishment.<sup>385</sup> It is possible that self-defence may be viewed as permitting a defender to determine the measurement and allocation of the aggressor's punishment, and therefore as a form of arbitrary, extrajudicial punishment. This is clearly not the reason for allowing self-defence as a defence; rather it is a legal mechanism for

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<sup>380</sup> C.C.Ryan 'Self-Defense, Pacifism, and the Possibility of Killing', *op cit* fn 308 at 516.

<sup>381</sup> Support for this claim is provided in J.McMahan 'Self-defense and Culpability', *op cit* fn 258 at 764.

<sup>382</sup> S.Wallerstein 'Justifying the Right to Self-Defense: A Theory of Forced Consequences', *op cit* fn 56 at 1003.

<sup>383</sup> Of course it is not the least harmful consequence to the aggressor, however, it is the most morally preferable option.

<sup>384</sup> The approach of consequentialism is commonly associated with the debate over numbers, and explains that the best consequences result from the most moral option, and that therefore, saving a larger group of lives redresses the loss of a smaller group. D.Wasserman & A.Strudler 'Can a Nonconsequentialist Count Lives?' (2003) 31(1) *Philosophy & Public Affairs* 71, at 72.

<sup>385</sup> F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 53 and 64.

securing justice to individuals when faced with difficult circumstances and a threat to personal security. While consequentialism is insufficient by itself as a justification, if applied in conjunction with the other theories, it seems reasonable as it regards the preservation of the innocent defender's life as the greatest good, and the consequential loss of the aggressor's life as the least bad outcome. Its approach is similar to the following theory of forced choice, where because of the aggressor's actions, his rights to defend himself are impaired based on the threat he poses to the defender.

#### **2.2.4 Forced Choice**

Wasserman believes that it is the very fact that the aggressor forces a choice between lives at the time defensive force is used against him, that renders self-defence both morally and legally acceptable.<sup>386</sup> The aggressor is in control of the situation; while he has forced a choice with respect to the defender, he himself could withdraw the attack introducing a new choice where neither would be harmed.<sup>387</sup> The defender merely acts within his best interests, and it is this disparity between the actions of the parties that supports the view that it is the aggressor's life that should be sacrificed. Responsibility is linked to choice as the criminal law emphasises the need for individuals to be acting according to their free will before criminal liability arises. In the present example, the defender lacks this ability to choose.<sup>388</sup>

Wallerstein also uses this theory to explain why self-defence is justified, claiming that this is the most appropriate approach in order to fully unravel the defence. He mentions that it is because of the involuntariness of the defender's action, having been placed in a position where one has no choice but to either endure or subject force, that the action is permitted.<sup>389</sup> Individuals are permitted to prefer their own lives to that of others, especially aggressors who are posing a threat to their safety. Therefore, it renders it morally and legally permissible for a person to kill one's aggressor in self-defence, if that is the only way of saving one's own life.

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<sup>386</sup> D.Wasserman 'Justifying Self-Defense', *op cit* fn 143 at 357.

<sup>387</sup> *ibid* at 371-372.

<sup>388</sup> See R.A.Duff *op cit* 190, at 149. See also, S.J.Morse 'Culpability and Control' (1993-1994) 142 *University of Pennsylvania Law Review* 1587, at 1602.

<sup>389</sup> S.Wallerstein 'Justifying the Right to Self-Defense: A Theory of Forced Consequences', *op cit* fn 56 at 1006 and 1035.

It seems both logical and reasonable for a person to value one's own life more than the life of an aggressor who threatens to deny one's life, and therefore to choose to save oneself as opposed to suffering the aggression. Such reasoning appeals to the personal partiality approach,<sup>390</sup> entitling a defender to prefer to preserve one's own life over that of one's aggressor. This approach accords great emphasis on the aggressor's action, and due to his unlawful act, it is only natural that '*his suffering harm makes the outcome more just than it would be if the Victim were to be harmed instead*'.<sup>391</sup> This is connected to the lesser harmful result theory, or consequentialism, as it advocates that allowing force against the aggressor is the lesser harm, as he bears sole responsibility for the position the defender faces.<sup>392</sup>

Rodin discusses liability as a factor justifying the infliction of harms in self-defence.<sup>393</sup> This approach consists of assessing the relative status of the persons involved. It explains that in defence cases, while the aggressor is responsible for an unjust attack on a victim, and the forced choice that ensues, the defender (by virtue of being the victim) is not reciprocally responsible for using force to repel the attack. '*It is this asymmetry in their respective agency that explains why the villain [the aggressor] is liable to be killed by the defender and not the other way around (even though both may constitute a threat to the life of the other)*'.<sup>394</sup> It is therefore the aggressor's status as an unlawful threat, or risk of harm to the defender, which entitles the defender to avoid suffering the harm to one's own person by inflicting the harm on the aggressor instead. It is a situation where harm is highly likely to occur, either by the defender's lack of a defensive response against the aggressor, or by one's decision to react to the threat or attack by defending oneself. However, as explained by the rights and forfeiture theory, it is acceptable, as the person who suffers harm has forfeited his right not to be harmed under the circumstances.<sup>395</sup> Essentially, the general assertion is that by becoming an unjust threat to the life of the innocent defender, the aggressor forfeits his own right to life. The aggressor is thus not harmed

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<sup>390</sup> J.McMahan 'Self-Defense and the Problem of the Innocent Attacker', *op cit* fn 260 at 254.

<sup>391</sup> *ibid* at 262.

<sup>392</sup> S.Wallerstein 'Justifying the Right to Self-Defense: A Theory of Forced Consequences', *op cit* fn 56 at 999.

<sup>393</sup> D.Rodin 'Justifying Harm', *op cit* fn 150 at 75-76.

<sup>394</sup> *ibid* at 75-76.

<sup>395</sup> J.M.Firth & J.Quong 'Necessity, Moral Liability, and Defensive Harm' (2012) 31 *Law and Philosophy* 673, at 675.

in the same way as the defender would be if the attack was not stopped, as he has temporarily forfeited his rights for the duration of his attack.<sup>396</sup>

However, it must be noted that based on the harm principle, self-defence can be a risky activity for the defender. As it involves a heat of the moment reaction and the individual has limited options available, one may place oneself in a position of facing criminal liability if one's actions are not deemed reasonable in the circumstances.<sup>397</sup>

Regarding the defender's culpability when acting in self-defence, having good intentions and reasons for taking the risk of causing harm will reduce one's culpability considerably. In the context of self-defence, the intention usually required is for force to be used for the purpose of defence, although this may also entail an intention to harm the aggressor in order to achieve this.<sup>398</sup> In assessing the harm that is brought about in self-defence, it is necessary to appreciate and understand '*the reasons that motivate the action - in particular, whether the reasons are considered invalid or valid. In many contexts, people do not judge a harmful action as an instance of wrongdoing because they view the reasons motivating the action as valid and therefore deem causation of harm justifiable*'.<sup>399</sup> Defensive reasons are an example of these accepted reasons for causing harm, and the law does not demand a superior standard of people faced with a threat, and will take into consideration that they are responding in the heat of the moment. Therefore, the defender's instinctive reaction and assessment of the risk of causing harm to his aggressor can be explained by the forced choice he faced in the circumstances. The culpable act is appreciated in light of the risk as the defender viewed it at the time, and not according to the real nature of the risk involved.<sup>400</sup> Because the nature of the situation demands a spur of the moment reaction to a threat or an attack, despite responding in a normally harmful

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<sup>396</sup> The fact that the aggressor forfeits his rights does not mean that no harm is caused to him by the defender. If the aggressor suffers an injury then that clearly amounts to a harm. However, the perception of that harm is different, both legally and morally. The aggressor is not considered to have suffered a wrong in the same way as the defender.

<sup>397</sup> D.Rodin 'Justifying Harm', *op cit* fn 150 at 106.

<sup>398</sup> Reference must be made to the distinction between intention and foresight. While some cases of self-defence may also involve a direct intention to inflict injury, they will primarily involve the lawful intention of self-preservation, or indirect intent. Namely, the injury may have been foreseen but it is not the main reason for acting, it is merely a by-product or 'side-effect'. See section 2.2.5 for a discussion on the doctrine of double effect.

<sup>399</sup> P.Sousa C.Holbrook & J.Piazza 'The Morality of Harm' (2009) 113 *Cognition* 80, at 82.

<sup>400</sup> L.Alexander 'Crime and Culpability' (1994) 5 *Journal of Contemporary Legal Issues* 1, at 5.

manner, society is tolerant of the conduct in the circumstances, as it involves a threat to life and physical security,<sup>401</sup> and a lack of alternative choices for the defender.

### **2.2.5 Double Effect**

The weighing of consequences and forced choices leads to a consideration of the doctrine of double effect, which will only be mentioned here briefly. The theory states that an action generating a good outcome may be morally justified despite also bringing about a bad consequence providing it was not intended, but merely foreseeable.<sup>402</sup> The doctrine is commonly utilised in medical ethics, especially when considering palliative care and decisions regarding end of life treatment.<sup>403</sup> There are many different approaches to the philosophical construct,<sup>404</sup> and a number of varying yet fundamentally similar requirements have been developed.<sup>405</sup> There are several conditions that must be satisfied:

*‘(1) the act by itself must be morally good or at least indifferent. (2) ... [it] must intend to cause a good effect. (3) A bad effect may have been foreseen but not intended ... (4) The good effect follows from the action, not from the bad effect ... (5) There is a sufficiently grave reason for achieving the good effect, compensating for hazarding the evil effect’.*<sup>406</sup>

Self-defence cases are capable of satisfying these criteria, and indeed, double effect was first developed within the context of self-defence.<sup>407</sup> Therefore, these conditions merit individual consideration within the context of the defence.

First, as has already been seen in this chapter, acting to preserve one’s life is acceptable and regarded as morally justified. As self-defence is essentially the infliction of defensive force to avoid an unlawful threat, this means that the act itself

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<sup>401</sup> A.H.Loewy ‘Culpability, Dangerousness, and Harm: Balancing the Factors on which our Criminal Law is Predicated’ (1987-1988) 66 *North Carolina Law Review* 283, at 301.

<sup>402</sup> F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 53.

<sup>403</sup> For example, see G.Williams ‘The Principle of Double Effect and Terminal Sedation’ (2001) 9 *Medical Law Review* 41, at 41.

<sup>404</sup> D.Ormerod & K.Laird, *op cit* fn 121 at 409.

<sup>405</sup> C.Foster J.Herring K.Melham & T.Hope ‘The Double Effect Effect’ (2011) 20 *Cambridge Quarterly of Healthcare Ethics* 56, at 56-57.

<sup>406</sup> A.J.Billings ‘Double Effect: A Useful Rule That Alone Cannot Justify Hastening Death’ (2011) 37 *Journal of Medical Ethics* 437, at 438.

<sup>407</sup> C.Foster J.Herring K.Melham & T.Hope ‘The Double Effect Effect’, *op cit* fn 405 at 60.

can be regarded as morally good.<sup>408</sup> The very nature of self-defence is the resistance of unjust aggression which is a lawful objective, thus, satisfying the first requirement of double effect.

Second, the intention is merely to repel the unlawful threat that the defender is exposed to, and thus is taken in pursuit of a good effect. The avoidance of the suffering of harm by the innocent defender is a good outcome of the defensive act. As self-defence requires the defender to use only reasonable force, this ensures that the intention of the actor is merely to resist the harm he would otherwise suffer from the threat posed by the aggressor.<sup>409</sup>

Third, while defenders will often focus on the need for defence itself and not the end consequence for the aggressor, it is likely that some harm will have been foreseen. In the difficult circumstances of self-defence which require instinctive reactions, a defender will foresee that his defensive action may result in harm to his aggressor. Nevertheless, in order to satisfy the requirements of self-defence, he is merely doing what was necessary at the time.<sup>410</sup> Therefore, the important point here is that while he foresees the potential harm, he does not intend it. There is a clear moral differentiation between intention and foresight within the doctrine of double effect.<sup>411</sup> The approach regards the foreseen negative consequences of actions as permissible, while classifying an intended negative outcome as unacceptable. However, this distinction can be considered to represent a very narrow difference.<sup>412</sup>

Fourth, the defensive force is directed towards the threat, therefore the risk to the defender's safety is repelled as a direct result of his defensive action, not by the harm sustained by the aggressor.<sup>413</sup> Finally, if the defensive force used was necessary for the preservation of the defender's life, then the risk he faced clearly provides a sufficiently serious reason for acting as he did. This involves an assessment of proportionality,<sup>414</sup> to ensure that the harm caused to the aggressor accords to the harm

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<sup>408</sup> S.Uniacke *Permissible Killing: The Self-Defence Justification of Homicide*, *op cit* fn 8 at 99-100.

<sup>409</sup> F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 53.

<sup>410</sup> S.Uniacke *Permissible Killing: The Self-Defence Justification of Homicide*, *op cit* fn 8 at 100.

<sup>411</sup> C.Foster J.Herring K.Melham & T.Hope 'The Double Effect Effect', *op cit* fn 405 at 59.

<sup>412</sup> F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 54.

<sup>413</sup> S.Uniacke *Permissible Killing: The Self-Defence Justification of Homicide*, *op cit* fn 8 at 109.

<sup>414</sup> C.Foster J.Herring K.Melham & T.Hope 'The Double Effect Effect', *op cit* fn 405 at 60.

avoided by the defender. Thus, this satisfies the standards required by the doctrine of double effect.

Providing the conduct is reasonable in the circumstances, the defender does not commit a criminal offence, as he does not intend to cause harm to his aggressor, but merely intends to protect himself, which is a lawful and moral intention. The doctrine of double effect justifies itself by separating the defender's intention from the foreseeable effect of the action.<sup>415</sup> Thus, as in all just cases of self-defence the defender's intention will be to repel the threat, and as long as one does not also intend the harm, but merely permits it as a 'side effect',<sup>416</sup> one's action will be permissible even if the consequences were foreseeable.<sup>417</sup>

### **2.2.6 Autonomy**

Another possible justification for self-defence places emphasis on the autonomy of individuals. This is the approach preferred by Sangero who asserts that it is the existence of an injury to one's autonomy that is the crucial justifying element of self-defence.<sup>418</sup> Within this context, autonomy is broadly specified as control over one's own person, the claim to one's self-determination, and right not to be interfered with, thus to be free from threats and attacks. This principle is different to the previous theories under discussion as it focuses not on the individual's reasons for preferring their own life, or the weighing of consequences, but rather solely on the intrusion with one's liberty to determine one's own life experiences.

Sangero claims that there is a need to strike a balance between the following factors: the expected physical injury to the defender if protective action is not taken; personal

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<sup>415</sup> Thomson has provided a hypothetical example of a case employing double effect standards. She explains '*the Good pilot in Strategic Bomber may bomb the Bad munitions factory in order to cause the Goods to win the war (good outcome), despite the fact that he will thereby cause the deaths of some children (bad outcome), if while he foresees that he will cause the deaths of the children, their deaths are not intended by him as a means to causing the Goods to win the war*'. J.J.Thomson 'Self-Defense', *op cit* fn 9 at 292.

<sup>416</sup> A.McIntyre 'Doctrine of Double Effect' in E.N.Zalta (ed), *The Stanford Encyclopedia of Philosophy*, (Fall 2011 Edn), <<http://plato.stanford.edu/archives/fall2011/entries/double-effect/>> (accessed on 15/08/14).

<sup>417</sup> S.Uniacke Permissible Killing: The Self-Defence Justification of Homicide, *op cit* fn 8 at 92.

<sup>418</sup> B.Sangero *Self-Defence in Criminal Law*, *op cit* fn 73 at 98 and 102.

autonomy; the offender's culpability; and the social-legal order.<sup>419</sup> This approach ascribes great value to the rights of individuals and their self-determination through the importance attached to autonomy, while the respect ascribed to the social-legal order ensures appropriate and adequate protection within wider society.<sup>420</sup> Thus, an appropriate balance is struck between one's right of self-determination and the concurrent rights of other individuals as well.

The ability to self-govern and to protect oneself and one's own personal sphere of control is highly valued within society, making the autonomy principle justifying self-defence plausible and persuasive. In order to prioritize individual self-determination the law must develop a means to ensure the protection of individual sovereignty, because without this security there can be no enjoyment of self-determination.<sup>421</sup> It is the very fact that some injury or harm is caused to a person, by the presence of a threat to his life or a physical attack upon him, which infringes his own autonomy that triggers the right to self-defence. Schopp argues that this intrusion on the victim's autonomy forces him to either defend himself against it or tolerate it, and because of this overstepping by the aggressor, he loses his protected rights of sovereignty and freedom from interference.<sup>422</sup>

Such reasoning is compelling as it allows a wide scope for self-defence, and bears similarity to the principle of forfeiture in the rights theory. It does not, for example, impose a restriction that the harm suffered or inflicted must result in death in order for the defence to be relevant, while at the same time an act of self-defence justified by individual autonomy also protects the social-legal order.<sup>423</sup> It does this by permitting the defender to take defensive action to prevent the commission of a crime, which in turn deters aggressors from offending.<sup>424</sup> This satisfies moral standards, as an individual's sphere of sovereignty represents an entity that should not be interfered with by others, and which is thus to be protected as a moral and legal right. However, it is problematic that the principle of autonomy conflicts with the requirement of

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<sup>419</sup> *ibid* at preface and 102.

<sup>420</sup> R.F.Schopp *Justification Defences and Just Convictions*, (Cambridge University Press, Cambridge, 1998), at 59.

<sup>421</sup> T.M.Funk 'Justifying Justifications', *op cit* fn 70 at 636.

<sup>422</sup> R.F.Schopp *Justification Defences and Just Convictions*, *op cit* fn 420 at 75.

<sup>423</sup> T.M.Funk 'Justifying Justifications', *op cit* fn 70 at 641.

<sup>424</sup> B.Sangero Self-Defence in Criminal Law, *op cit* fn 73 at 67-69.



proportionality.<sup>425</sup> This is evident in the contrast between the limitation that the proportionality requirement places upon actors, and the unlimited nature of autonomy. While proportionality requires actions to correspond proportionately to the offensive force they repel, autonomy claims that an individual should not have to suffer interferences, and may repel any aggression with the force that they determine is appropriate. The proportionality requirement is necessary for the fair and lawful application of self-defence, and if the autonomy principle is incompatible with proportionality it cannot provide an adequate and appropriate justification by itself.<sup>426</sup> Nevertheless, autonomy is an important factor in the permissibility of defensive action.<sup>427</sup>

The threat posed need not always be to one's life, it may be any threat of physical violence, for example, the loss of limbs or rape. The crucial factor is that an injury to one's autonomy is involved - '*self-defense extends to parts of yourself that are integral to you; your life is important, but it does not compromise all that is important or importantly defended*'.<sup>428</sup> Nevertheless, the killing or injuring of another in order to protect oneself from suffering harm, can still be regarded as a serious moral wrong,<sup>429</sup> therefore it is important that the defensive action is justified. As the autonomy principle does not restrict defensive force to threats to one's life, it guards against an interference with one's person, which although arguably are less severe harms than death, can still constitute serious intrusions to self-determination. In this regard, it bears similarity to the importance attached to the right of self-preservation under natural law as previously considered.

The autonomy argument, while convincing, has the potential for abuse and the over exertion of self-determination by individuals. As it does not impose limitations on the degree of harm that must be threatened, other than that it harms one's autonomy, its application is broader than the other theories, which is problematic. Nevertheless, its broad scope is also its advantage. The autonomy argument can provide a justification

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<sup>425</sup> *ibid* at 63. It should also be noted that the autonomy principle is not absolute, as is evident in end-of-life situations, particularly in respect of the desires of patients to terminate their lives.

<sup>426</sup> Kremnitzer and Ghanayim note that justifying self-defence on the defender's autonomy removes the need for proportionality. M.Kremnitzer & K.Ghanayim, *op cit* fn 277 at 892.

<sup>427</sup> B.Sangero Self-Defence in Criminal Law, *op cit* fn 73 at 99.

<sup>428</sup> T.Kasachkoff, *op cit* fn 53 at 512.

<sup>429</sup> S.Uniacke *Permissible Killing: The Self-Defence Justification of Homicide*, *op cit* fn 8 at 3.

of self-defence in circumstances when the threat faced by the defender is less grave than a threat to life. While many theories prioritise killing in self-defence and defence against threats to life,<sup>430</sup> autonomy can justify the use of force against non-fatal threats and the infliction of non-fatal force. However, it can also provide a justification of self-defence in situations where a defensive action results in the death of the aggressor. Thus, it can be applied within a variety of different contexts, to different levels of threats and use of force. The autonomy principle makes a vital contribution considering the wide-reaching application of self-defence.

### **2.2.7 Which theory?**

The moral justification of self-defence can be achieved through a combination of the theories above, rather than by a single theory as no individual theory succeeds in providing an adequate justification on its own. As McMahan says, *‘rather than there being a single, unitary justification for killing in self-defense, there may be several distinct justifications, so that self-defense may be justified in one way in one case and another way in another’*.<sup>431</sup> This provides the most logical and comprehensive justification for the defence, and provides flexibility to adapt to particular circumstances. Such a view encompasses approaches that focus on the aggressor and his liability, as well as approaches centred upon the defender, and the permissibility of using defensive harm against the threat or attack.<sup>432</sup>

It is better to suggest that a mixture of (i) the temporary forfeiture of one’s rights by virtue of posing an unlawful threat to the defender; (ii) the natural law emphasis on self-preservation; (iii) the weighting of the consequences in favour of the defender; (iv) the moral guilt of the aggressor in forcing the choice of lives; (v) the separation of intention and foresight as a matter of double effect; and, (iv) the importance of the defender’s autonomy constitutes the reasons why self-defence is justified as a defence. Any weaknesses inherent in the separate theories may be overcome by combining the good qualities in order to produce one coherent body of thought, which justifies the defence without risking a disregard of the aggressor’s rights. There are

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<sup>430</sup> For example, the rights and forfeiture theory, discussed in section 2.2.1.

<sup>431</sup> J.McMahan ‘Self-Defense and the Problem of the Innocent Attacker’, *op cit* fn 260 at 256.

<sup>432</sup> K.K.Ferzan ‘Culpable Aggression: The Basis for Moral Liability to Defensive Killing’, *op cit* fn 148 at 671.

clearly several reasons why the defence is considered justified, and these should be appreciated respectively for their individual merits. Therefore, the conclusion drawn is that no single theory fully justifies self-defence on its own, but a mixture of different theories provides a reasoned justification.

It is not only the theoretical reasons why actions of self-defence are justified that have been widely discussed. The criminal law concept and test of reasonableness, embodied in the form of the reasonable man, or the reasonable person,<sup>433</sup> also need examination in order to gain a better understanding of its merits and effectiveness. It is necessary to consider this matter as it forms a fundamental aspect of an assessment of self-defence, namely the objective criterion. As previously mentioned, the test for reasonable force in self-defence involves the subjective consideration of the circumstances as the defender perceived them, and the objective consideration of whether the force was necessary in those circumstances from the perspective of the 'reasonable man'.<sup>434</sup>

### **2.3 Reasonable person test and individual characteristics**

*'Reasonableness in criminal law is an objective standard ... not an empirical or statistical measure of how average members of the public think, feel, or behave. Average is not the same as right or appropriate'.*<sup>435</sup> The difficulty and challenges raised by such a standard, is how the appropriate level of reasonableness should be stated.<sup>436</sup> With self-defence, although the action would generally be wrongful, because it is carried out for the purpose of self-defence, this is considered to be a reasonable reaction. The meaning of reasonable here is that the particular action falls

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<sup>433</sup> Peter Just is of the opinion that the use of the term 'reasonable person' is more appropriate than 'reasonable man'. P.Just Book Review of 'The Demise of the 'Reasonable Man': A Cross-Cultural Study of a Legal Concept' by M.Saltman (1994) 21(4) *American Ethnologist* 908, at 908. Additionally, Caroline Forell argues that *'the genderless reasonable person replaced the reasonable man as the universally appropriate standard for determining what was ordinary'*. C.Forell 'Homicide and the Unreasonable Man' (2003-2004) 72 *The George Washington Law Review* 597, at 601.

<sup>434</sup> The criteria for self-defence were set out in section 2.1.

<sup>435</sup> P.Westen 'Individualizing the Reasonable Person in Criminal Law' (2008) *Criminal Law and Philosophy* 137, at 138.

<sup>436</sup> G.P.Alpert & W.C.Smith 'How Reasonable is The Reasonable Man?: Police and Excessive Force' (1994-1995) 85 *The Journal of Criminal Law and Criminology* 481, at 483.

within ‘allowable limits’,<sup>437</sup> and has not gone beyond what is acceptable in the circumstances. The action is justified on the ground that any reasonable person could and would have committed it in the circumstances. Debate has circulated around whether this standard is appropriate.<sup>438</sup>

As noted earlier, one crucial reason for utilising the reasonable person test is the fact that self-defence permits a defence even when the defender is mistaken as to one’s need to use defensive force.<sup>439</sup> Lee states that ‘*if we eliminated the reasonableness requirement, a self-defender would have to be correct in his belief that the victim posed an imminent threat of bodily harm*’.<sup>440</sup> The reasoning here is that even when a defender mistakes the need for force, the reasonable person test is still engaged to assess whether the reaction was permissible in the circumstances as mistaken. However, without the existence of the standard, the action might not be justified under such circumstances, as it would be difficult to justify the consideration of mistake without infringing the aggressor’s rights. This would impose a much higher bar to the defence than is applied through the reasonableness standard.

Another reason why it is important to retain the reasonable person test is the danger that ‘*a person ... who was actually, but unreasonably, afraid of another person because of that person’s race or ethnicity, could claim self-defence and be acquitted*’.<sup>441</sup> Removing the objective element from the defence would risk allowing self-defence in situations where people over-react due to unfounded pre-existing beliefs or opinions about certain individuals or groups of people. The test ensures that only reasonable force is permitted by the law, and protects against the use of unnecessary force due to prejudice alone, or due to other irrelevant reasons. It would be dangerous to remove the test of the reasonable person, as it would distort the

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<sup>437</sup> A.L.Epstein ‘The Reasonable Man Revisited: Some Problems in the Anthropology of Law’, 7 *Law and Society Review*, 1972-1973, at 646.

<sup>438</sup> For example, Hörnle argues that the standard is problematic as the objective reasonable person may set a high expectation on defenders, while introducing subjectivity into the reasonable person assessment reduces the value of the standard. T.Hörnle ‘Social Expectations in the Criminal Law: the “Reasonable Person” in a Comparative Perspective’ (2008) 11(1) *New Criminal Law Review* 1, at 15.

<sup>439</sup> See section 2.1.1(b)(i).

<sup>440</sup> C.Lee “‘Murder and the Reasonable Man Revisited’: A Response to Victoria Nourse’ (2005-2006) 3 *Ohio State Journal of Criminal Law* 301, at 303.

<sup>441</sup> *ibid* at 304.

requirement that an action should be necessary and proportional, and that it should not be based on unlawful reasons.<sup>442</sup>

Fletcher states that the ‘*advantage of the single term “reasonable” is that it packs into the initial norm criteria that are the same as or similar to those invoked in assessing “abuse of rights” at a secondary level of argument ... the privilege of self-defense is no longer absolute. It is limited at the outset by the concept of reasonableness*’.<sup>443</sup> This is successful in guiding the determination of defensive actions accordingly between lawful and unlawful self-defence, and provides a net to filter through only appropriate actions. However, Simons argues that a better standard would be to question whether the individual had acted with a ‘reasonable degree of self-control’.<sup>444</sup> This standard is more relevant to and associated primarily with the partial defence of loss of control, and is therefore unhelpful in cases of self-defence, as it could increase confusion by blurring the lines between different defences.

Another area of debate has circulated around the question of whether on occasion, the specific characteristics of the individual concerned should be considered when deciding whether the act is one of self-defence.<sup>445</sup> Westen suggests that the standard would be better formulated if it considered the individual in light of all his characteristics, and then questioned whether he showed respect for the interests of others in the circumstances.<sup>446</sup> Accordingly, the defendant’s character is of importance to the reasonableness of one’s actions. This idea is similar to a term used by Alpert and Smith, ‘subjective objectivity’.<sup>447</sup> That is, that there is a dual consideration, merging subjective elements into the general objective nature of self-defence, and that ‘*subjective objectivity is the essence of the “reasonable person”*’.<sup>448</sup>

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<sup>442</sup> Ashworth states that ‘*This restriction is important because, if necessity were the sole requirement, the infliction of death or serious injury might in theory be justifiable if it were the only means of preventing a relatively trivial assault*’. A.Ashworth ‘Self-Defence and the Right to Life’, *op cit* fn 243 at 296. Although Ashworth is discussing proportionality, the principle is transferable to the reasonable person standard, as the same aim is pursued.

<sup>443</sup> G.P.Fletcher ‘The Right and the Reasonable’ *op cit* fn 83 at 953.

<sup>444</sup> K.W.Simons ‘Self-defense: Reasonable Beliefs or Reasonable Self-control?’ (2008) 11 *New Criminal Law Review* 51, at 51 and 59.

<sup>445</sup> The relevance of the mental characteristics of individuals is discussed in Chapter 6 in relation to emotions.

<sup>446</sup> P.Westen ‘Individualizing the Reasonable Person in Criminal Law’, *op cit* fn 435 at 140 and 160.

<sup>447</sup> G.P.Alpert & W.C.Smith ‘How Reasonable is The Reasonable Man?’, *op cit* fn 436 at 486.

<sup>448</sup> *ibid*, at 486.

It is interesting to question whether some of the individual's characteristics should be taken into consideration when assessing the availability of self-defence.<sup>449</sup> This would mean considering subjective facts, while the test for self-defence is mainly objective.<sup>450</sup> Klansky claims that '*it is important that the jury consider the individual characteristics of the defendant, for there is no "reasonable man" who can know whether the defendant's conduct was justified*',<sup>451</sup> and mentions that it is a fictional concept. Indeed, it may be argued that it is unfair to refuse to appreciate the balance of power between the defender and the aggressor. Weak, vulnerable people might not be able to adequately defend themselves without using a weapon, and in order to effectively do so, carry a weapon. On the other hand, what would be the position of people who have advanced defensive/aggressive skills, such as some form of martial arts training, who have the potential to present greater danger than an average person, even without possessing any weapons - would it be more reasonable to allow the use of a weapon to counter a threat by such attackers? Certainly, those with a high level of self-defence skills are not restricted from using their skills defensively against aggressors, providing the force used is reasonable in the circumstances.<sup>452</sup>

If the principle that each case of self-defence is considered according to the circumstances of the case is applied in the context of self-defence as a defence to weapons offences, it may be desirable and useful to allow such considerations to bear some weight in the assessment process. Pichhadze argues for increased flexibility in the application of the proportionality requirement as '*a physical attack by a more powerful aggressor can potentially be as deadly as a weapon*',<sup>453</sup> and it should be

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<sup>449</sup> B.Sangero *Self-Defence in Criminal Law*, *op cit* fn 73 at 149.

<sup>450</sup> It should be taken into consideration that increasing the subjectivity component of a defence makes it more compatible with an excuse form of defence, while assessments of objectivity indicate a justificatory form of defence. S.Yeo 'Revisiting Necessity' (2010) 56 *Criminal Law Quarterly* 13, at 18. The combination of subjective and objective standards, termed as a 'modified objective test', is evident in *R v Latimer*, (*A-G of Canada and others intervening*), *op cit* fn 244 at 32.

<sup>451</sup> N.Klansky 'Bernard Goetz, A "Reasonable Man": A Look at New York's Justification Defense People v Goetz' (1987-1988) 53 *Brooklyn Law Review* 1149, at 1167.

<sup>452</sup> See E.Baskind 'Law Relating to Self Defence', (*British Self Defence Governing Body*, 7 September 2015) <[http://www.bsdgb.co.uk/index.php?Information:Law\\_Relating\\_to\\_Self\\_Defence](http://www.bsdgb.co.uk/index.php?Information:Law_Relating_to_Self_Defence)> (accessed on 15/09/15). Smith states that there is a need for clarity and consistency within the law regarding individual characteristics, across the general defences. J.C.Smith & T.Rees 'Case Comment: *R v Martin*: Homicide: Murder - Excessive Force in Self-defence' (2002) *Criminal Law Review* 136, at 138.

<sup>453</sup> A.Pichhadze 'Proposals for Reforming the Law of Self-Defence' (2008) 72 *Journal of Criminal Law* 409, at 430.

possible to conclude that the ‘reasonable man’, or ‘ordinary person’, would also have used a weapon in response to an attack by a physically stronger attacker.<sup>454</sup>

Similarly, it is claimed that on occasion, necessity should be ‘*ascertained according to the physical capacity of the attacker and the defender*’<sup>455</sup> to acknowledge the impact the differing strengths and characteristics of the parties may have on the outcome of their confrontation. This was confirmed by the Court of Appeal in *R v Martin*<sup>456</sup> proclaiming that evidence of the defendant’s physical characteristics may be admissible, nevertheless holding on the other hand that psychiatric conditions could not be taken into account.<sup>457</sup>

One suggestion is that while the defendant must be judged according to the standard of the reasonable person, the test would allow consideration of the reasonable person within the same specific circumstances as the defendant faced at the time.<sup>458</sup> Thus, what this suggests is that the standard of the general reasonable man could be narrowed, in order to better fit the specific circumstances of each case. In a way, this already is the position of the law, as the circumstances are considered according to the defendant’s belief at the time of the attack, and considers the reasonableness of the actions within this context.

It is suggested in *Smith & Hogan*<sup>459</sup> that section 76(8) of the Criminal Justice and Immigration Act 2008 could strengthen the argument for allowing individual characteristics to be considered. The provision states that the considerations that are listed to be considered in section 76(7) are not exhaustive, and others may be relevant when assessing the reasonableness of the force according to section 76(3).<sup>460</sup> The imbalance in the size and strength of the parties, being only one type of potentially

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<sup>454</sup> *ibid* at 430.

<sup>455</sup> J.Slater, *op cit* fn 78 at 144.

<sup>456</sup> *R v Martin op cit* fn 102.

<sup>457</sup> J.Martin & T.Storey *Unlocking Criminal Law*, (4th edn, Hodder Education, London, 2013), at 238; T.Storey ‘Court of Appeal: Self-defence: Insane Delusions and Reasonable Force’ (2014) 78 *Journal of Criminal Law* 12, at 13-114. This was followed in the case of *R v Camns* [2005] EWCA Crim 2264, at 19, where it was said that ‘*defendants do not set their own standards of reasonableness*’. It was more recently applied in *R v Oye* [2013] EWCA Crim 1725.

<sup>458</sup> V.Nourse ‘After the Reasonable Man: Getting over the Subjectivity/Objectivity Question’ (2008) 11 *New Criminal Law Review* 33, at 33.

<sup>459</sup> D.Ormerod *Smith and Hogan’s Criminal Law*, *op cit* fn 16 at 383.

<sup>460</sup> *ibid*. See section 2.1, Chapter 2, for the full text of the legislative provision.

contributory characteristic,<sup>461</sup> could be responsible for the defender's belief that one's use of defensive force was reasonable in the circumstances and therefore should be permissible in court.<sup>462</sup> This is evident in the statement that '*the object of a weapon was to assist weakness to cope with strength*',<sup>463</sup> as a method of overcoming the odds against individuals. An example where an imbalance of size and strength may encourage the use of a weapon is when victims of domestic abuse, typically a female victim and male partner, act to defend themselves.<sup>464</sup> While the objective test of the 'reasonable person' represents the norm in society of acceptable behaviour towards other people, in some cases there is a need to look at the specific individuals to assess the reasonableness of their conduct on subjective grounds.

If the law were to allow subjective considerations in cases where it would make a significant difference to the outcome of the trial, and would be necessary for the maximum enforcement of justice, the defence of self-defence could be utilised in the fairest and widest possible manner. This could be practised by only allowing the consideration of characteristics in appropriate cases, where not doing so would be absurd because it represents an obvious factor in the individual's decision-making process.<sup>465</sup> This would prevent the misuse of the defence and dispel fears that this occasional consideration of subjective characteristics would make the defence easier to plead.<sup>466</sup> There is a need for clarification concerning to what extent an individual's physical characteristics may be relevant. While self-defence involves a mixture of subjective and objective tests, appreciating the situation from the defendant's honest

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<sup>461</sup> A weaker individual is more likely to respond out of fear against a stronger aggressor. R.Holton & S.Shute 'Self-Control in the Modern Provocation Defence', *op cit* fn 238 at 72.

<sup>462</sup> For example, other factors that may contribute to the way in which an individual perceives a situation and reacts include age and past experience. Simons suggests that individual characteristics can encompass many more, such as the '*physical, ethnic, racial, cultural, age, sexual preference, or gender characteristics of the defendant*'. K.W.Simons 'Self-defence: Reasonable Beliefs or Reasonable Self-control?', *op cit* fn 444 at 71. The impact of an individual's mental characteristics, particularly their emotional response, will be discussed in Chapter 6.

<sup>463</sup> J.L.Malcolm *Guns and Violence: The English Experience*, *op cit* fn 359 at 179.

<sup>464</sup> S.S.M.Edwards 'Abolishing Provocation and Reframing Self-defence – the Law Commission's Options for Reform', *op cit* fn 16 at 189-190.

<sup>465</sup> An example might include shaping a person's decision to carry a weapon for protection.

<sup>466</sup> For example, consider a vulnerable, elderly individual who is threatened by a group of physically stronger people and fears for his life, and consider another individual who is part of a gang and regularly puts himself in a position of danger. While permitting the considerations of individual characteristics may be acceptable in the former scenario, it would be unreasonable in the latter. Examples of cases relating to self-defence and offensive weapons will be discussed in Chapter 3. However, this must be assessed sensibly as weakness should not justify disproportionate action. See D.J.Baker *Glanville Williams Textbook of Criminal Law*, (3rd edn, Sweet & Maxwell, London, 2012), at 695 and 700.



perspective and expecting one's actions to be reasonable according to those circumstances, it does not encompass the subjective reality of the individual's characteristics. An authority is required, as although *R v Martin*<sup>467</sup> above has excluded the relevance of psychological characteristics, it has opened the door to considerations of physical characteristics, the scope of which is uncertain.<sup>468</sup> This matter is particularly relevant in cases involving offensive weapons, because as discussed above, a physically weaker individual may be unable to defend himself without the assistance of a weapon.

This dilemma of individual characteristics reflects the difficulty of applying a general legal standard as each individual is different. Similarly, the individual characteristics of the aggressor or individual posing the threat to the defender must be considered.

#### **2.4 The distinction between culpable and innocent aggressors**

Situations of self-defence involving different types of aggressors present complications. The philosophy behind the defence often raises context-specific challenges for the justification of the defence, raising questions that probe its validity. The matters referred to in this respect are situations of self-defence involving different types of aggressors.<sup>469</sup> There are distinctions based on culpable or innocent aggressors, and on whether the defensive action is exerted against a passive threat, or a mere bystander.<sup>470</sup> It is necessary to clarify briefly which type of aggressor and threat the present research is addressing. The distinction has an impact upon the justifiability of using defensive force, and it must be explained in order to understand the capacity in which this research considers circumstances to be justified.

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<sup>467</sup> *R v Martin* *op cit* fn 102.

<sup>468</sup> J.C.Smith & T.Rees 'Case Comment: *R v Martin*: Homicide: Murder - Excessive Force in Self-defence', *op cit* fn 452 at 137.

<sup>469</sup> P.Westen & J.Mangiafico, *op cit* fn 85 at 839.

<sup>470</sup> In Thomson's influential work on self-defence, she composed hypothetical scenarios to reflect (in her terms) the villainous aggressor (culpable), the innocent aggressor, the innocent threat, and the bystander. These examples will be discussed in their context shortly. J.J.Thomson 'Self-Defense', *op cit* fn 9 at 283-284, 287, and 289-290. Alexander critically explored Thomson's categories challenging the basis of the right not to be killed in each scenario and the justifiability of self-defence. L.Alexander 'Self-defense, Justification and Excuse' (1993) 22(1) *Philosophy & Public Affairs* 53, at 53, 60, and 65.

Culpable aggressors are those who are criminally liable for their actions as they are considered to be legally responsible agents. Thomson's hypothetical case demonstrates the permissibility of killing a culpable or villainous aggressor. Her fantastical scenario involves standing in a meadow when a sudden threat presents in the form of a truck being driven intentionally towards you, and the only way to prevent it is to kill the driver.<sup>471</sup> This is a morally justified instance of killing in self-defence. Generally, the innocent individual, that is the defender, is morally favoured over the culpable individual - that is the aggressor, in such situations.<sup>472</sup>

Innocent aggressors, or non-culpable aggressors as they are sometimes called, are those who are not regarded as legally responsible for their actions, and therefore cannot be held criminally liable.<sup>473</sup> Innocent aggressors are therefore individuals who are either mentally incapacitated, or below the age of criminal responsibility, but who nevertheless impose a risk to life.<sup>474</sup> Thomson's example of an innocent aggressor involves the same threat from a truck in a meadow, but this time the driver is not responsible for his actions.<sup>475</sup> Again, self-defence is available here and morality permits killing in self-preservation,<sup>476</sup> but it may be claimed that such action is merely excused this time and not justified.<sup>477</sup>

There is another category that is often discussed when theorising self-defence, and that is the position regarding passive or innocent threats. A passive threat is one that puts the defender's life at risk, but the threat merely arises due to circumstances and not by way of attack. Thomson's example here involves a different scenario. The threat is faced by a sunbather when a fat man is pushed off the cliff directly above.<sup>478</sup> By not acting, the defender faces certain death. By acting to deflect the path using the sun awning, he can save himself, but will kill the innocent man falling towards him through no fault of his own. Similarly, Leverick offers the example of 'the

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<sup>471</sup> J.J.Thomson 'Self-Defense', *op cit* fn 9 at 283-284.

<sup>472</sup> J.McMahan 'Self-Defense and the Problem of the Innocent Attacker', *op cit* fn 260 at 259.

<sup>473</sup> F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 5.

<sup>474</sup> K.K.Ferzan 'Self-defense, Permissions, and the Means Principle: A Reply to Quong' (2010-2011) 8 *Ohio State Journal of Criminal Law* 503, at 503.

<sup>475</sup> J.J.Thomson 'Self-Defense', *op cit* fn 9 at 284-286.

<sup>476</sup> Montague is of the opinion that it is permissible to take self-defensive action against such individuals, and that this indeed can be justified. See P.Montague 'Self-Defence and Innocence: Aggressors and Active Threats' (2000) 12(1) *Utilitas* 62, at 62.

<sup>477</sup> J.J.Thomson 'Self-Defense', *op cit* fn 9 at 286.

<sup>478</sup> *ibid* at 287.

mountaineer roped to her companion who falls and threatens to pull the companion off the mountain'.<sup>479</sup> Although unfortunate for the fat man and the mountaineer's fallen companion, self-defence can controversially again provide a defence here.<sup>480</sup> While philosophical arguments often design fantastical cases for illustration,<sup>481</sup> the fallen mountaineer is realistic and has resulted in cases.<sup>482</sup> Morality permits the defender to prefer the preservation of his own life and not to suffer the injustice of death himself. However, it may again be claimed that this is based on the excuse form of the defence, and not the justification.

The final situation that can be distinguished from culpable and innocent aggressors, and from passive threats, is that of an innocent bystander. An innocent bystander is different to the other threats in that he does not pose a direct threat to the life of the defender. He is merely present at the time of emergency, and presents an obstacle to the defender's safety, or lies in the path that leads to the defender's survival.<sup>483</sup> Essentially, any self-protective action taken against a bystander would be morally questionable.<sup>484</sup> Self-defence would be impermissible as these cases involve placing the bystander in the path of the danger, to suffer the harm instead of the defender.

While it is clearly acceptable for the defender to exert force in self-protection against the culpable aggressor, and perhaps more controversially, also against the innocent aggressor and the passive threat, it is never permissible to exert that force against the innocent bystander, who is not causally related to the creation of the threat.<sup>485</sup> Individuals within this latter category are merely possible shields to the threat faced, and self-defence law does not support or favour the defender's option to utilise such individuals as a means to an end.<sup>486</sup> This is the only fair approach to the situation as the presence of an unlawful threat is a condition of the justifiability of self-defence.

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<sup>479</sup> F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 5.

<sup>480</sup> H.Frowe, *op cit* fn 97 at 64. This is due to the direct threat posed by the falling person who will kill the defender unless he takes action in self-defence.

<sup>481</sup> *ibid* at 4.

<sup>482</sup> For example, the almost fatal story of Joe Simpson in *Touching the Void*. See J.Simpson, *Touching the Void*, (Vintage, London, 1997).

<sup>483</sup> H.Frowe, *op cit* fn 97 at 23.

<sup>484</sup> J.J.Thomson 'Self-Defense', *op cit* fn 9 at 289-290.

<sup>485</sup> J.McMahan 'Self-Defense and the Problem of the Innocent Attacker', *op cit* fn 260 at 255.

<sup>486</sup> S.Wallerstein 'Justifying the Right to Self-Defense: A Theory of Forced Consequences', *op cit* fn 56 at 1001-1002.

An innocent bystander is not culpable nor is he attacking the defender, therefore the defender's interests of self-preservation does not take priority in this situation.<sup>487</sup>

Although it is necessary to be aware of these varying types of aggressors, for the purposes of the present research, it will be assumed that the aggressor discussed is a culpable aggressor. Unless stated otherwise this will be the approach throughout the thesis. It is particularly important to be aware of the fact that it is mainly culpable aggressors that are discussed, in relation to the possession of offensive weapons, as this could affect the application of the law to the offence and possible defence of self-defence.

## **2.5 Conclusion**

The nature of the defence of self-defence as a complete justification for crimes of violence, up to and including murder, requires a number of conditions and limitations to be enacted in order to safeguard the rights of the aggressor as well as that of the defender. Although it is morally acceptable to defend oneself against unlawful threats and this is protected as a conditional right,<sup>488</sup> there must be a limit upon the force that is permissible in order to safeguard rights. The law must balance the individual's right to self-defence against the undesirable risk of authorising people to take matters into their own hands and rendering aggressors as enemies to the public who are denied all rights. As has been demonstrated in this chapter, this is achieved through the standard of reasonable force, with its requirements for necessity and proportionality. Although these conditions can pose challenges of interpretation, they act as a gateway for permissible acts of self-defence, and as a barrier to actions that fall beyond the boundaries of the defence.

Balancing these competing interests is complicated and depends upon what is held reasonable in the particular circumstances. It is difficult to gauge with certainty from the law exactly what actions individuals may justly take in self-defence. It is necessary in order to allow the wider applicability of the defence to keep its parameters vague so that the law may adapt to include any lawful instances of self-

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<sup>487</sup> H.Frowe, *op cit* fn 97 at 23.

<sup>488</sup> This was discussed in section 2.2.1.

defence without arbitrarily denying any justified examples of the defence.<sup>489</sup> The legislator must either strive to set out all the relevant rules and all the exceptions to them in the fullest possible detail, so as not to exclude any lawful use of the defence, or provide only the outline of the principles that should be considered, and leave the work of providing the details to the courts and the common law.<sup>490</sup>

As highlighted in this chapter, it is difficult to find a general consensus regarding the justifiability of self-defence. Several theories have been developed to explain why it is a permissible action. The theories of rights and forfeiture, natural law, consequentialism, forced choice, double effect, and individual autonomy were discussed as providing the most convincing explanation when combined together. Similarly, the benefits of the reasonable person test were explored alongside the relevance of the individual's physical characteristics, as this may play a significant role in decisions to carry and use weapons in self-defence.<sup>491</sup>

Indeed, one area where the law appears particularly grey is in relation to the connection between self-defence and offensive weapons. This is a complicated topic as self-defence may justify some actions involving the use of weapons, such as the use of a weapon to inflict injury upon an aggressor, but not others, such as preparatory possession. The problem of weapons use further challenges the philosophical foundations of the defence and its boundaries. The next chapter discusses the law in relation to offensive weapons and bladed articles and the possibility of self-defence as a defence to offences of their use and possession.

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<sup>489</sup> R.Card *Card, Cross & Jones Criminal Law*, (18th edn, Oxford University Press, Oxford, 2008), at 707.

<sup>490</sup> B.Sangero *Self-Defence in Criminal Law*, *op cit* fn 73 at 355. This is partly a matter of where the law is expected to be expressed, as more and more often statutes are enacted to address issues already covered by the common law.

<sup>491</sup> The latter will be developed further in Chapter 6, where a discussion of the individual's mental characteristics will also be discussed in relation to the emotion of fear.

## **Chapter 3: Offensive Weapons and Bladed Articles**

### **3. Introduction**

As the legal requirements of self-defence have been explained in the previous chapter, this chapter examines a specific instance that challenges the scope of the defence, namely, the relationship between self-defence and offences involving the possession and use of offensive weapons. The connection between the defence and these offences is problematic. It is difficult to state with certainty whether or not the defence will be available within the context of offensive weapons. These challenges will be the topic for consideration in this chapter, which explains the situation regarding offensive weapons and articles with blades or sharp points.<sup>492</sup>

The fear that inclines individuals to carry weapons is perhaps supported by the public belief that there is an entitlement to do ‘whatever it takes’ to safeguard personal security. Indeed, the criminal law defence of self-defence is applicable to a wide range of criminal offences. In theory, it is a potential defence to the strict liability offences of possessing an offensive weapon or a bladed article, but in practice it does not extend to these offences.<sup>493</sup> As will become evident, considering that self-defence is a complete and justificatory defence, it is unlikely to be regarded as a suitable defence for crimes of possession. Offences involving offensive weapons, namely, possession or use of the article to threaten or cause injury, are of particular interest to this study, and the defence will primarily be explored in this context.<sup>494</sup> The underlying connection between offensive weapons legislation and self-defence is

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<sup>492</sup> As will become evident, despite the distinct definitions of these possession offences, they are closely related and similarities have emerged in their interpretation and treatment by the courts. They will be discussed as separate issues but also as combined issues. As the offensive weapons offence has a broader reach, when referring to both types of offences collectively, the term ‘offensive weapons’ will at times be used as a broader term encapsulating both types of prohibitions. See section 3.2 for clarification on the scope of these offences.

<sup>493</sup> The strict liability approach inherent in section 1 of the Prevention of Crime Act 1953 was emphasised in the case of *Felix Densu*. ‘The whole purpose of the Act is to provide strict liability in respect of objects regarded as dangerous’. See *R v Felix Densu* [1998] 1 Cr App R 400, at 404-405.

<sup>494</sup> See generally F.Llewelyn ‘Protecting Lives, Restricting Knives - The Issue of Self-defence and Possession Offences’ (2013) 3 *QMUL Law Journal - Postgraduate Conference Edition* 11. The author based this article upon the research undertaken for the present chapter.

relatively clear, as most people claim they carry weapons in order to protect themselves.<sup>495</sup>

In order to address this topic, the chapter will first outline the context and background to the carrying of offensive weapons in the UK. Secondly, the law will be examined to clarify the present position in relation to weapons, and determine its effectiveness. The objective of the relevant legislation will be emphasised, and the type of harm involved in weapons possession offences will be discussed. Thirdly, it will be necessary to consider the importance attached to the nature of the weapon involved, and the impact this has on legal application. The nature of the weapon is a pivotal consideration and factor in the applicability of the defence, and in relation to knives, it is unlikely that a reasonable excuse for carrying a knife will be found. The law in this area, in contrast to that of self-defence, is located in statutes and expressly states that there are exceptions to the offences. Therefore, the fourth aspect to be discussed will be the statutory defences which may be available to weapons offences. Once this has been discussed, the chapter will delve deeper into the relationship between self-defence and weapons offences, which is the fifth matter under consideration. Whilst individuals are generally permitted to use a weapon of opportunity<sup>496</sup> to secure self-defence, it is far more contentious when an individual deliberately forearms oneself in case of a future attack. Sixthly, the chapter proceeds to explore legal and non-legal solutions or proposals to address the issues of weapons possession. Finally, consideration will be given to various initiatives and programmes that have been developed in an attempt to reduce the carrying and use of offensive weapons.

### **3.1 The research context**

For several years, crimes involving offensive weapons have been widely reported by the news media. The topic has repeatedly hit the headlines, suggesting an alarming

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<sup>495</sup> D.Sethi et al (eds) *European Report on Preventing Violence and Knife Crime Among Young People*, (World Health Organization Europe, 2010), at 17; C.Eades et al. *'Knife Crime' A Review of Evidence and Policy*, (2nd Edn, Centre for Crime and Justice Studies, King's College London, 2007), at 21.

<sup>496</sup> 'Weapon of opportunity' is a term used by the author to describe situations where a weapon of some sort happens to be available by chance for the defender to use. This is in contrast to a 'preparatory weapon' that an individual knowingly carries in case of attack. A weapon of opportunity may be any item capable of being used defensively that happens to be nearby, within the defender's reach, at the time of necessity. For example, a loose brick, a stone, a branch, or a piece of metal could all be considered a weapon of opportunity depending on their chance placement.

number of incidents, and therefore creating the perception that it is a growing problem in the UK.<sup>497</sup> Clough opened her paper at the SLS conference in September 2013 by stating that for many, knife crime has become ‘old news’.<sup>498</sup> Although it is now somewhat less prominently reported in the national press than in 2006-2008, it remains a continuing and resurfacing problem.<sup>499</sup> The issue remains an important policy consideration, and is evidently on the government’s agenda, as a policy briefing was held in January 2015 in London on gang and knife crime.<sup>500</sup>

Indeed, new legislation provides evidence that the issue remains an important matter and that there is a clear policy objective to respond more forcefully against carriers. Despite reasoned and stern opposition, the Criminal Justice and Courts Act 2015 was passed including a provision introducing a mandatory custodial sentence for individuals aged sixteen or over, who commit a second offence of possessing an offensive weapon or bladed article in public or on school premises.<sup>501</sup> This move is problematic as there is no evidence to support that tougher legislation will address the issues of weapon carrying. It was compellingly opposed at both the House of Commons and House of Lords, however the majority voted to retain the provision as part of the Bill. The main objections against the new provision were that it removes sentencing discretion from the courts, and could have a significantly detrimental

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<sup>497</sup> R.Wood ‘UK: the Reality Behind the ‘Knife Crime’ Debate’ (2010) 52(2) *Race & Class* 97, at 97-98; The Government Reply to the Seventh Report from the Home Affairs Committee Session 2008-09 HC 112, *Knife Crime*, (2009), at 1.

<sup>498</sup> J.Clough "Sharpening the Knife: A Critique of the Criminalisation of Bladed Articles", (SLS Conference, Edinburgh, September 2013).

<sup>499</sup> While this upward trend in knife related injuries may not be reflected nationwide, incidents appear to be on the rise in London. D.Hill ‘How Should the Police Respond to London's Knife Crime Injury Rise?’, (*The Guardian*, 16 June 2015), <<http://www.theguardian.com/uk-news/davehillblog/2015/jun/16/how-should-the-police-respond-to-londons-knife-injury-rise>> (accessed on 18/06/15); D.Hill ‘London Knife Crime: Less 'Tough' Talk and More Thinking Might Help’, (*The Guardian*, 26 June 2015), <<http://www.theguardian.com/uk-news/davehillblog/2015/jun/26/london-knife-less-tough-talk-and-more-thinking-might-help>> (accessed on 27/06/15).

<sup>500</sup> GovKnow, ‘Gang and Knife Crime: Prevention and a Pathway Out’, (London, January 29 2015), <<http://govknow.com/briefing-detail.html?id=1389>> (accessed on 20/12/14).

<sup>501</sup> Section 28 of the 2015 Act amends section 1 of the Prevention of Crime Act 1953, by tightening the response in relation to repeat offenders.



effect on young offenders who will be exposed to incarceration<sup>502</sup> and perhaps be further criminalised by the experience.<sup>503</sup> Section 28, subsection 2B states that:

*‘the court must<sup>504</sup> impose an appropriate custodial sentence (with or without a fine) unless the court is of the opinion that there are particular circumstances which —*

*(a) relate to the offence, to the previous offence or to the offender, and*

*(b) would make it unjust to do so in all the circumstances.’<sup>505</sup>*

Allowing more consideration of self-defence within the context of weapons possession would evidently sit uneasily alongside the existing and emerging legislation that seeks to tackle the issue. Self-defence can only be permitted providing it does not operate against the deterrent objective of the legislator. Therefore, it appears that self-defence should be clearly stated not to provide a defence for such offences, unless there is evidence to prove that the use of the weapon when faced with an imminent threat was reasonable.

Further evidence that knife crime remains a problem is provided by cases such as the widely reported brutal murder of a soldier in Woolwich.<sup>506</sup> The attack involved the use of meat cleavers. This example may be classed as an act of terrorism due to the motives of the offenders, and distinguished from the more common fear or gang related attacks. However, the level of aggression coupled with the use of horrific weapons epitomises the gravity of weapons possession and use: the fear that it causes;

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<sup>502</sup> Standing Committee for Youth Justice, *Briefing: Mandatory custodial sentence for knife possessions for children Criminal Justice and Courts Bill Clause 27*, 2014, <<http://scyj.org.uk/wp-content/uploads/2014/10/CJC-Bill-Knife-Crime-Clause-27-briefing.pdf>> (accessed on 01/11/14). It was argued in this briefing that such a provision could lead to a substantial increase in the prison population.

<sup>503</sup> HL Deb 21 July 2014, cols 931-955.

<sup>504</sup> Joint Committee on Human Rights, *Legislative Scrutiny: (1) Serious Crime Bill, (2) Criminal Justice and Courts Bill (second Report) and (3) Armed Forces Service Complaints and Financial Assistance) Bill*, (2013-2014), 2.1-2.68, at 2.16-2.19. The use of the word ‘must’ here indicates a lack of alternative options. Therefore, during legislative scrutiny, the Joint Committee on Human Rights required an explanation as to the implications of this on the right to liberty. The Committee was satisfied with the explanation that judicial discretion would remain, and that therefore the provision was not contrary to the right to liberty.

<sup>505</sup> An ‘appropriate custodial sentence’ is defined in subsection 2C: ‘*In this section “appropriate custodial sentence” means — (a) in the case of a person who is aged 18 or over when convicted, a sentence of imprisonment for a term of at least 6 months; (b) in the case of a person who is aged at least 16 but under 18 when convicted, a detention and training order of at least 4 months*’.

<sup>506</sup> H.Warrell J.Blitz & J.Pickford ‘Woolwich Attack: Soldier Brutally Killed on London Street’, (*Financial Times*, 23 May 2013), <<http://www.ft.com/cms/s/0/04ea3ce8-c2fe-11e2-9bcb-00144feab7de.html#axzz2X3NAvMAG>> (accessed on 23/06/13).

the tragic consequences which can follow; and the reasons why such crimes attract high levels of media and public interest, as well as requiring legal control.

Other relatively recent news stories have involved stabbings in public places during busy periods when many people are in close proximity. These include the stabbing and murder of a schoolteacher by a pupil in her classroom in front of other pupils;<sup>507</sup> the stabbing and murder of a schoolgirl on a bus on her way to school in Birmingham;<sup>508</sup> and also the stabbing of three men in a nightclub in Birmingham.<sup>509</sup> The fact that such incidents occur in public places at peak times, as opposed to the more typical areas that are feared, for example, dark deserted car parks,<sup>510</sup> adds to the fear and horror of the event. From the perspective of the news media, it certainly appears that the presence of weapons on the streets is a very present and real threat to public safety, with many similar cases occurring on a regular basis.<sup>511</sup> The wide scale reporting of offences involving offensive weapons can paint a bleak picture of society.<sup>512</sup> This is often described as an instance of social breakdown, or an instance of moral panic,<sup>513</sup> which sensationalist news reporting of offensive weapons offences can accentuate. A moral panic is the occurrence of an '*exaggerated reaction, from the media, the police or wider public, to the activities of particular social groups*',<sup>514</sup> which highlights the topic as a matter of concern to the public, in need of attention and action by the police and the Government.

However, as will become evident, the statistical data currently available does not confirm this picture of social breakdown, and it is difficult to assess whether or not

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<sup>507</sup> *R v Cornick*, Leeds Crown Court, 3 November 2014. The sentencing remarks of Mr Justice Coulson are available at the Courts and Tribunals Judiciary; Judgments, <<http://www.judiciary.gov.uk/judgments/r-v-william-cornick/>> (accessed on 10/11/14).

<sup>508</sup> A.Rudd 'Horror on the No 9 Bus: Schoolgirl Died from Single Stab Wound to the Chest', (*Mirror*, 8 March 2013), <<http://www.mirror.co.uk/news/uk-news/christina-edkins-schoolgirl-died-single-1750497>> (accessed on 24/06/13).

<sup>509</sup> BBC News, 'Birmingham China Red Nightclub Stabbing Leaves Three Injured', (23 June 2013), <<http://www.bbc.co.uk/news/uk-england-birmingham-23019733>> (accessed on 24/06/13).

<sup>510</sup> P.Brantingham & P.Brantingham 'Criminality of Place: Crime Generators and Crime Attractors' (1995) 3(3) *European Journal on Criminal Policy and Research* 5, at 6.

<sup>511</sup> Fear of crime and media representations of crime will be explored in Chapter 6.

<sup>512</sup> The appearance of societal deterioration can affect fear of crime levels. J.Jackson & B.Bradford 'Crime, Policing and Social Order: on the Expressive Nature of Public Confidence in Policing' (2009) 60(3) *The British Journal of Sociology* 493, at 500.

<sup>513</sup> R.Sparks 'Entertaining the Crisis: Television and Moral Enterprise' in D.Kidd-Hewitt & R.Osborne (eds) *Crime and the Media: The Post-modern Spectacle*, (Pluto Press, London, 1995), at 54-56.

<sup>514</sup> I.Marsh & G.Melville 'Moral Panics and the British Media – A Look at Some Contemporary 'Folk Devils'' (2011) *Internet Journal of Criminology*, ISSN 2045-6743 (Online) 1, at 2.

the incidents of such crimes are in fact on the rise.<sup>515</sup> This difficulty is partly due to the lack of reliable statistics, which do not provide a complete picture of the incidents of crimes involving offensive weapons, and changes in recording practices that make comparisons between different years challenging. The data collected on crime and offences involving weapons in particular, is widely accessible and available. Following the recommendations of the National Statistician's Review of crime statistics in June 2011, which was accepted by the Home Secretary, it is now easier to gain access to the data, as from April 2012 it is both collated and published by the Office for National Statistics.<sup>516</sup> There are three main data sets of interest and assistance to the present study, that of Police Recorded Crime, the Crime Survey for England and Wales, and Hospital Episode Statistics. Each set is useful to an extent, but each has its own limitations.

### **3.1.1 The situation according to the statistics**

First, the data available from Police Recorded Crime (PRC) is an annual publication, which is gathered based on the reporting of crime to the police. It is a valuable source, as every crime that is reported to the police will be documented. However, this means that reliance on PRC statistics alone is problematic because it relies on crimes being reported before they can be recorded. Due to the fact that many crimes occur without ever coming to the attention of the police, the overall picture gained from the data collected could potentially be incorrect, with possible underreporting of some crimes occurring. Research by Tarling and Morris has shown that the seriousness of the crime has a direct impact on the likelihood that it will be reported; the more serious the crime, the more likely it will be recorded.<sup>517</sup> Their research also explained other reasons why crimes may not be reported to the police, and one concerning reason was the belief that *'the police would not be interested or could not solve the case'*.<sup>518</sup> Therefore, there are potentially many crimes that occur without being reported to the

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<sup>515</sup> This is supported by research conducted by Wood at the Institute of Race Relations. She notes that *'Recent media portrayal of, and government response to, the 'knife crime epidemic' has created a distorted image of the reality on the ground'*. R.Wood, *op cit* fn 497 at 97.

<sup>516</sup> Office for National Statistics, *Crime Statistics, Period Ending December 2012*, <<http://www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/period-ending-december-2012/index.html>> (accessed on 23/06/13).

<sup>517</sup> R.Tarling & K.Morris 'Reporting Crime to the Police' (2010) 50 *British Journal of Criminology* 474, at 476.

<sup>518</sup> *ibid* at 481.

police for these reasons, and one study claims that ‘*more than 50% of assaults presenting to hospital are not reported to the police*’,<sup>519</sup> implying that the actual number of offences which occur could be far greater than that reported in the PRC.

For the year ending in December 2012, the PRC record for offences involving a knife or a sharp instrument represents a 16% decrease on the previous year, at a total of 27,415 offences.<sup>520</sup> By the end of June 2014, the overall recorded figure was 26,007.<sup>521</sup> This decline is attributed to the decrease in the numbers of robberies and cases of actual bodily harm and grievous bodily harm involving a knife or sharp instrument. It does not provide a guide in relation to possession offences, which may not have witnessed a reduction in the same way.<sup>522</sup>

Another complication arises from the methods of counting and recording crimes, as these have changed considerably over the years, meaning that comparing data from previous years is possible only in relation to crimes of robbery, murder and homicide.<sup>523</sup> The previous methods did not account for different types of weapons, making it difficult, for example, to trace the use of knives in such crimes over the years to the present day. This leaves a gap regarding crimes of possession and

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<sup>519</sup> R.Maxwell et al. ‘Trends in Admissions to Hospital Involving an Assault Using a Knife or Other Sharp Instrument, England, 1997-2005’, (2007) 29(2) *Journal of Public Health* 186, at 187. Another study by Morris discusses the role of medical practitioners. It notes that where patients are admitted to hospital with injuries arising from a suspected gun or knife attack, and consent to disclose information is either withheld or impossible to obtain, the medical practitioner will be required to exercise discretion as to whether to breach confidentiality if necessary for the public interest. K.Morris ‘UK Doctors Begin Reporting Gun and Knife Crime’ (2009) 374(Dec 19/26) *The Lancet* 2041, at 2041.

<sup>520</sup> Office for National Statistics, *Statistical Bulletin: Crime in England and Wales, Year Ending December 2012 - Offences Involving Knives and Sharp Instruments*, <<http://www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/period-ending-december-2012/stb-crime-in-england-and-wales--year-ending-december-2012.html#tab-Offences-involving-knives-and-sharp-instruments>> (accessed on 23/06/13).

<sup>521</sup> Office for National Statistics, *Statistical Bulletin: Crime in England and Wales, Year Ending June 2014 - Offences Involving Knives and Sharp Instruments*, <<http://www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/period-ending-june-2014/stb-crime-stats--year-ending-june-2014.html#tab-Offences-involving-knives-and-sharp-instruments>> (accessed on 01/09/14). While the overall numbers of crimes involving knives or sharp instruments have declined, it must be noted that certain categories have increased during 2013-2014, such as rape and sexual assault.

<sup>522</sup> Indeed, according to the figures for the year ending in June 2015, there was an increase of 9% in offences of possessing these weapons. See Office for National Statistics, *Statistical Bulletin: Crime in England and Wales, Year Ending June 2015 - Offences Involving Knives and Sharp Instruments*, <<http://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/2015-10-15#offences-involving-knives-and-sharp-instruments>> (accessed on 10/01/16).

<sup>523</sup> D.Shaw et al. ‘Possession of a Knife and Private Defence: Dilemmas in the Pursuit of Personal Security in England and Wales’ (2011) 39 *International Journal of Law, Crime and Justice* 266, at 267.

assaults, which cannot easily be appreciated in terms of their actual occurrence, be that on the rise or in decline.

In January 2014, the UK Statistics Authority decided that PRC would no longer be designated as national statistics, as it does not attain the necessary standards.<sup>524</sup> Changes are being made to bring all police forces in line with each other, to minimise over-recording and under-recording based on reaching individual targets,<sup>525</sup> to produce a new code of ethics, and start annually auditing each police force area.<sup>526</sup>

The second set of useful annual data is the Crime Survey for England and Wales (CSEW), which was previously called the British Crime Survey, and has been running since 1982. It is distinct from the PRC as it is a victimisation survey of 38,000 members of the public living in households in England and Wales.<sup>527</sup> It surveys around 35,000 adults over 16 years of age, and 3,000 children between the ages of 10 and 15. It questions their experience of crime over the last twelve months. It may provide a more complete picture of overall incidents of crime, as it is possible that some individuals who did not report the crime to the police feel more comfortable disclosing information to this survey. However, there are a few notable omissions from the survey, in relation to homicide data and historical data relating to children between 10 and 15 years of age.<sup>528</sup> Until 2009, the survey completely excluded young people under the age of 16. This was problematic considering that young people are often the social group most affected by crimes involving offensive weapons, and are the most heavily victimised section in relation to such crimes.<sup>529</sup> There are fears that

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<sup>524</sup> Public Administration Select Committee, *Caught Red-handed: Why we can't Count on Police Recorded Crime Statistics*, (HC 2013-14, 1-54), at 3, <<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubadm/760/760.pdf>> (accessed on 01/11/14).

<sup>525</sup> HMIC, *Crime-recording: Making the Victim Count*, (2014), <<http://www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/crime-recording-making-the-victim-count.pdf>> (accessed on 25/07/15), at 29-31, 49 and 51.

<sup>526</sup> Public Administration Select Committee, *Caught Red-handed: Why we can't Count on Police Recorded Crime Statistics*, *op cit* fn 524 at 41-47.

<sup>527</sup> The sample size has decreased from 46,000 in previous years, to 38,000 in 2012-2013. This is for reasons of ensuring proportionate representation across smaller police force areas and larger police force areas. Office for National Statistics, *The 2012-2013 Crime Survey for England and Wales: Volume 1: Technical Report*, (TNS BMRB, 2012), at 6-7.

<sup>528</sup> R.Chaplin J.Flatley & K.Smith (eds) *Crime in England and Wales 2010/11*, (Home Office Statistical Bulletin, 2011), at 56.

<sup>529</sup> C.Eades et al. *'Knife Crime' A Review of Evidence and Policy*, *op cit* fn 495 at 24. More specifically than young people in general, it is young males who are most at risk of victimisation.

children younger than 16 also carry weapons for protection,<sup>530</sup> and it is possible that ‘an adolescent’s first experience with weapons may be as early as 12 years of age’.<sup>531</sup> It is vital to note that ‘stabbing injury assaults among children less than 15 years of age resulted in 70 hospital admissions in 2004/5’,<sup>532</sup> thus although perhaps surprising, this age category is indeed at risk of victimisation of weapons offences.

As a response to these concerns, children between 10 and 15 years of age are now also interviewed for the survey. The sample is much smaller, as eligible children are selected from the households already participating in the main survey, and the aim is to interview around 3,000 children between 10 and 15 years of age. The primary objective of including this age group in the survey is to provide estimates of the levels of crime experienced by children and their risk of victimisation.<sup>533</sup> In the data gathered for the twelve month period of 2009/10, it was estimated that 1% of children aged 13 to 15 had carried a knife for their own protection in the previous year, with 13% of those aged 13 to 15 years old reporting that they knew someone who had carried a knife for this reason.<sup>534</sup> Therefore, the overall picture gained from the survey should become more representative following this inclusion.<sup>535</sup>

In 2011/2012 the survey reported overall that 7% of offences involved the use of a knife, which is consistent with the PRC report of 6%.<sup>536</sup> According to the CSEW, knives or sharp instruments were reportedly used in 35% of homicides and 48% of attempted murders.<sup>537</sup> This demonstrates that although the overall percentage is fairly

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<sup>530</sup> J.Hoare et al. *Children’s Experience and Attitudes Towards the Police, Personal Safety and Public Spaces: Findings from the 2009/10 British Crime Survey Interviews with Children Aged 10 to 15*, (Home Office Statistical Bulletin, 2011), at 44; A.Aynsley-Green ‘There is a Determination at All Levels to Reduce the Gun and Knife Crime Problem, Not Least Among Children and Young People Themselves’ (2009) 76(1) *Criminal Justice Matters* 45, at 45.

<sup>531</sup> R.D.Vaughan et al. ‘Carrying and Using Weapons: A Survey of Minority Junior High School Students in New York City’ (1996) 86(4) *American Journal of Public Health* 568, at 568.

<sup>532</sup> R.Maxwell et al. *op cit* fn 519 at 187.

<sup>533</sup> J.Hoare et al. *op cit* fn 530 at 13.

<sup>534</sup> *ibid* at 43.

<sup>535</sup> *ibid* at 5. The information gathered in relation to this age group was initially only published as experimental statistics in 2010, following a feasibility study prior to full inclusion. See also Office for National Statistics, *User Guide to Crime Statistics for England and Wales*, (October 2014), at 5.

<sup>536</sup> Office for National Statistics, *Statistical Bulletin: Crime in England and Wales, Year Ending December 2012 - Offences Involving Knives and Sharp Instruments*, <<http://www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/period-ending-december-2012/stb-crime-in-england-and-wales--year-ending-december-2012.html#tab-Offences-involving-knives-and-sharp-instruments>> (accessed on 23/06/13).

<sup>537</sup> *ibid*.



low, within the individual categories, these weapons are regularly involved in serious crime, as they are easily accessible and utilised as facilitators of crime. The figures for 2013/2014 demonstrate that the overall number of crimes committed by the use of a knife or sharp instrument has remained consistent with the previous 12 months. This is so despite an increase in the reporting of rape and sexual offence cases, as there has been a reduction in cases of robbery using these weapons.<sup>538</sup> However, the figures for the year ending in June 2015 show an increase of 4% on the previous year for the overall amount of offences recorded using a knife or sharp instrument,<sup>539</sup> showing the remaining prevalence of these weapons in criminal activity.

The third data set which provides useful reports of these crimes, is the information gathered by NHS hospital admissions, and recorded by the Hospital Episode Statistics.<sup>540</sup> The information is gathered on a provisional monthly basis, and collated for publication as an annual report. In the year ending September 2012, the number of admissions as a result of an assault with a sharp instrument (defined as any object capable of piercing the skin) was 4,121 - a decrease of 12% on the previous year.<sup>541</sup> This therefore reinforces the data gathered by the PRC and CSEW, which together provide a fuller picture of the current situation.<sup>542</sup> The figures for 2014 confirm this downward trend, with a 5% decrease on the previous year, at 3,654 admissions.<sup>543</sup> The data also shows that young males, between the ages of 18-25, are the social group most affected by weapons offences, and are the social group most likely to require admission to hospital as a result of an assault with a knife or sharp object.<sup>544</sup>

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<sup>538</sup> Office for National Statistics, *Statistical Bulletin: Crime in England and Wales, Year Ending June 2014 - Offences Involving Knives and Sharp Instruments*, <<http://www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/period-ending-june-2014/stb-crime-stats--year-ending-june-2014.html#tab-Offences-involving-knives-and-sharp-instruments>> (accessed on 01/11/14).

<sup>539</sup> Office for National Statistics, *Statistical Bulletin: Crime in England and Wales, Year Ending June 2015 - Offences Involving Knives and Sharp Instruments*, <<http://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/2015-10-15#offences-involving-knives-and-sharp-instruments>> (accessed on 10/01/16).

<sup>540</sup> *ibid.*

<sup>541</sup> Office for National Statistics, *Statistical Bulletin: Crime in England and Wales, Year Ending December 2012 - Offences Involving Knives and Sharp Instruments*, *op cit* fn 486.

<sup>542</sup> J. Shepherd & V. Sivarajasingam 'Injury Research Explains Conflicting Violence Trends' (2005) 11 *Injury Prevention* 324.

<sup>543</sup> Office for National Statistics, *Statistical Bulletin: Crime in England and Wales, Year Ending June 2014 - Offences Involving Knives and Sharp Instruments*, *op cit* fn 488.

<sup>544</sup> Health and Social Care Information Centre, Key facts, 15 January 2013, <<http://www.hscic.gov.uk/searchcatalogue?productid=10414&q=x99&sort=Relevance&size=10&page=1#top>> (accessed on 24/06/13).

### 3.1.2 The problematic case of identifying weapons offences

The difficult challenge of estimating the scale of these types of criminal activity is compounded by the fact that it is problematic to detect when a person is committing an offence of possession in the first place. The full scope of the legislation prohibiting the possession of offensive weapons will be explored in section 3.2, however, a possession offence arises where “*any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon*”.<sup>545</sup> Indeed, most examples of weapons offences, and ‘knife crime’ in particular, involve offences of possession, or the carrying of the article merely for use to threaten somebody, and most commonly do not cause physical harm to an identifiable victim.<sup>546</sup> Therefore, whether these crimes are ever discovered depends on the circumstances that unfold. If the knife carried is hidden, not used, not exposed or used to threaten somebody, and if the individual in question gives the police no reason to conduct a search, many unknown knives could be in circulation in the public domain, representing concealed danger. Although undeniably less serious than the use of a weapon to inflict injury on another person, such behaviour has potentially lethal consequences, and can cause significant fear within and danger to society. It is notable that in England and Wales in 2008/2009 the most common causes of homicide were knives and various other sharp instruments.<sup>547</sup> This reflects the gravity of the situation, as the more accessible an article is, the more likely it is that it will be used in crime.

For the purposes of this research, the weapons that will primarily be discussed are knives. The reason for this prioritisation is that knives are the most commonly carried weapons in the UK context, as they are the most easily accessible weapons available.<sup>548</sup> Reports by the news media, and political debates favour the term ‘knife crime’, which is very broad in its scope. This is an umbrella term, encompassing

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<sup>545</sup> The Prevention of Crime Act 1953, section 1(1).

<sup>546</sup> C.Eades et al. ‘Knife Crime’ A Review of Evidence and Policy, *op cit* fn 495 at 11 and 14.

<sup>547</sup> D.Shaw et al. *op cit* fn 523 at 266.

<sup>548</sup> ‘*The type of knife used to injure most frequently is the kitchen knife, probably because of its easy accessibility. However, young people tend to admit to carrying penknives, flick knives and other kinds of knives, which are also more commonly found by the police during stop and search operations. This may suggest that the knives used to cause serious injury may differ from those that are routinely carried*’. The Government Reply to the Seventh Report from the Home Affairs Committee Session 2008-09 HC 112, *Knife Crime*, (2009), at 5.



many different types of sanctioned behaviour. These vary in degrees of seriousness. At the lower end of the spectrum are cases of merely possessing knives, without intent to threaten or injure a person whilst carrying the article. At the higher end of the spectrum are cases where knives are used to facilitate crimes.

Criminologists argue that the sensational and emotionally charged use of the term ‘knife crime’ by the media carries a risk of normalising such crimes, and desensitises the issue. This in turn paints an exaggerated picture that civilisation within society is in disarray.<sup>549</sup> The same view is submitted here, that the greater the detail and more regular attention paid to these crimes, the greater the belief by consumers of the news that there is a high occurrence of such crimes and that they should be concerned about their safety. The majority of the population and consumers of the news media are far removed in reality from such crimes. Few will have personal experience of these offences, and media representations are therefore powerful in forming public perception about these crimes.<sup>550</sup> The outcome of these representations can have a negative impact upon communities.<sup>551</sup> Not only does it contribute to the levels of fear experienced, but also young people are often stereotyped as devious.<sup>552</sup> This is a simplified generalisation. It neglects to expose the truth that only a minority of young people in specific localities are in fact perpetrating these crimes. A Home Office Study has confirmed that the media portrayal of young people creates a sense of unfairness and injustice on their part. This incites their belief that they are being targeted, blamed without cause, and that the societal presumption is that all young people are intent on generating trouble and committing crimes.<sup>553</sup> Stephen has pursued this hypothesis, and emphasises the importance of appropriately characterising ‘youth’.<sup>554</sup>

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<sup>549</sup> C.Eades et al. ‘Knife Crime’ A Review of Evidence and Policy, *op cit* fn 495 at 9.

<sup>550</sup> Editorial, ‘Crime in England and Wales 2008-2009’ (2009) 9 *Criminal Law Review* 615, at 615.

<sup>551</sup> This will be explored further in Chapter 6.

<sup>552</sup> I.Marsh & G.Melville ‘Moral Panics and the British Media – A Look at Some Contemporary ‘Folk Devils’’, *op cit* fn 514 at 8.

<sup>553</sup> B.Kinsella *Tackling Knife Crime Together - A Review of Local Anti-Knife Crime Projects*, (Home Office, 2011), <<http://www.homeoffice.gov.uk/publications/crime/tackling-knife-crime-together/>> (accessed on 21/03/12), at 6-7.

<sup>554</sup> D.E.Stephen ‘Time to Stop Twisting the Knife: a Critical Commentary on the Rights and Wrongs of Criminal Justice Responses to Problem Youth in the UK’ (2009) 31(2) *Journal of Social Welfare & Family Law* 193, at 196.

As well as this negative image of young people, the public perception produced from media representations is accompanied by a sense of urgency for change. There is both an increased awareness of the dangers posed by weapons possession, and a belief that the law requires reform to allow the criminal justice system to respond more forcefully with harsher sentences.<sup>555</sup> The hope underlying such suggestions is that tougher repercussions will accomplish a change of behaviour, and deter the carrying of weapons. However, such a broad reaction ignores the fact that knife carrying is not a typical problem across the whole jurisdiction.

On the contrary, it is a problem associated most commonly with socially deprived areas within cities, where there is a high density of young people in the population.<sup>556</sup> Common risk factors emerge in such locations triggering patterns of gang behaviour, accompanied by knife crime. Among the obvious risk factors are the shortages of opportunities for personal development, in the form of education and employment, as well as a general lack of access to recreational facilities for young people.<sup>557</sup> These individuals become trapped, unable able to escape from poverty, and easily drawn into anti-social behaviour and criminal activities.<sup>558</sup> Notably, Tadros has explored the suggestion that when criminalizing conduct, consideration should be given to the arguably lower responsibility of the poor for their wrongdoing, due to the economic injustices they suffer. This is a controversial matter and there is currently no framework for allowing such considerations, and 'blame shifting' within the criminal law.<sup>559</sup> Bagaric has discussed the relevance of disadvantaged backgrounds to the allocation of punishment, arguing that poverty impairs the capacity for choice within individuals and should be taken into consideration with regard to less serious offences, but is an inappropriate consideration in serious crimes such as sexual

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<sup>555</sup> F.Llewelyn, *op cit* fn 494 at 12.

<sup>556</sup> This is not to say of course that smaller towns and rural locations never experience issues with knife carrying.

<sup>557</sup> P.Squires et al. *Street Weapons Commission: Guns, Knives and Street Violence*, (Centre for Crime and Justice Studies, King's College London, 2008), at 107.

<sup>558</sup> S.Antrobus (chairman), *Breakthrough Britain: Dying to Belong: An In-depth Review of Street Gangs in Britain*, (The Centre for Social Justice, London, 2009), at 25-26; B.Kinsella *Tackling Knife Crime Together - A Review of Local Anti-Knife Crime Projects*, *op cit* fn 553 at 2.

<sup>559</sup> See V.Tadros 'The Architecture of Criminalization' (2009) 28(1) *Criminal Justice Ethics* 74, at 86; and generally V.Tadros 'Poverty and Criminal Responsibility' (2009) 43 *J Value Inquiry* 391.

assaults.<sup>560</sup> Although it is potentially dangerous to draw generalisations of this nature, it could be suggested that poorer social environments and living conditions attract a higher likelihood of weapons possession.

Studies have found that other risk factors contributing to an individual's decision to carry a weapon include: prior maltreatment,<sup>561</sup> victimisation, being a witness to crime,<sup>562</sup> or being a member of a gang. It is important to remember that the children and young people involved in such crimes are vulnerable members of society. The line between perpetrator and victim is very narrow, as reflected by the saying 'yesterday's victim is tomorrow's perpetrator'.<sup>563</sup> Being a part of a gang influences youths by emphasising the need to acquire and maintain a reputation, with peer pressure forcing certain behaviour in order to retain membership and gain respect.<sup>564</sup> Gangs offer protection to their members<sup>565</sup> and it can be dangerous to leave, as it is not only rivals that pose threats, but also former comrades.<sup>566</sup> Not only is it dangerous to leave a gang, but also to venture outside of the gang's territory. Shaw notes that part of a gang's identity relies on the geographical territory in which they operate.<sup>567</sup> There is a strong feeling of possession, ownership and the need to protect their territory from outsiders. This is often termed 'postcode' or 'turf wars'. Accordingly, this generates fear within communities and a belief that individuals require weapons in order to protect themselves.<sup>568</sup> The result is an increase in the overall likelihood of violence in such areas. Fights that may have been merely started by verbal abuse and

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<sup>560</sup> M.Bagaric 'Rich Offender, Poor Offender: why it (Sometimes) Matters in Sentencing', *op cit* fn 301 at 3. See also M-E.Sylvestre 'Rethinking Criminal Responsibility for Poor Offenders: Choice, Monstrosity, and the Logic of Practice' (2010) 55 *McGill Law Journal* 771, at 781, and 783.

<sup>561</sup> D.Sethi et al (eds), *op cit* fn 495 at vi.

<sup>562</sup> P.M.Kingery M.B.Coggeshall & A.A.Alford 'Weapon Carrying by Youth: Risk Factors and Prevention' (1999) 31 *Education and Urban Society* 309, at 326 and 327.

<sup>563</sup> This was highlighted by Junior Smart, Founder of the award winning SOS Project within St Giles Trust, during the policy briefing by GovKnow, *Gang and Knife Crime: Prevention and a Pathway Out*, London, 29 January 2015.

<sup>564</sup> A.Silvestri et al. *Young People, Knives and Guns: A Comprehensive Review, Analysis and Critique of Gun and Knife Crime Strategies*, (Centre for Crime and Justice Studies, King's College London, 2009), at 22.

<sup>565</sup> Many young people report joining a gang for protection. See for example J.Lane & K.A.Fox 'Fear of Property, Violent, and Gang Crime: Examining the Shadow of Sexual Assault Thesis Among Male and Female Offenders' (2013) 40(5) *Criminal Justice and Behaviour* 472, at 476.

<sup>566</sup> As evident in a number of strategies to assist young people to change their lives. For example, the policy briefing by GovKnow, 'Gang and Knife Crime: Prevention and a Pathway Out', (London, 29 January 2015), <<http://govknow.com/briefing-detail.html?id=1389>> (accessed on 20/12/14).

<sup>567</sup> D.Shaw et al. *op cit* fn 523 at 269.

<sup>568</sup> This risk of being attacked based on where one lives, and the fear it produces, is acknowledged in The Government Reply to the Seventh Report from the Home Affairs Committee Session 2008-09 HC 112, *Knife Crime*, (2009), at 5.

resolved by fists<sup>569</sup> instead can produce fatalities because these natural tools have been replaced with violent weapons.<sup>570</sup> This is accompanied by the attitude that weapons enable self-protection, and that it is preferable to be arrested than dead.<sup>571</sup> It has been stated that ‘*violent offenses committed with a weapon are the most dangerous offenses, often leading to serious injury, disability or death*’,<sup>572</sup> which means that the fact that more young people are deciding to carry weapons is significantly increasing the risks of violent crime. There appears to be a feeling within such communities that they must take matters into their own hands,<sup>573</sup> that they cannot merely wait and rely on the police for protection.<sup>574</sup> It is simply not possible for law enforcement officers to protect every single individual from every threat they face, and there are therefore occasions when it is necessary for measures to be taken for self-protection.<sup>575</sup>

This provides the sociological context for this chapter. Due to the general lack of awareness and knowledge of the law regarding offensive weapons and bladed articles, the chapter will now examine what falls within these classifications.

### **3.2 The Law - prohibited weapons**

Public opinion about the carrying of arms has changed considerably over the years, from a time when it was considered the norm to carry items such as swords, and many other types of intrinsically offensive weapons, to the modern age where a strict approach to governance is employed.<sup>576</sup> Social attitudes have changed. The norm in the Middle Ages, and the sixteenth and seventeenth centuries, was that members of the public had a duty to act to prevent a crime, to keep weapons for this purpose, and

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<sup>569</sup> P.M.Kingery M.B.Coggeshall & A.A.Alford, *op cit* fn 562 at 309.

<sup>570</sup> D.Sethi et al (eds), *op cit* fn 495 at 16-17.

<sup>571</sup> See A.Silvestri et al. *op cit* fn 564 at 38; and The Government Reply to the Seventh Report from the Home Affairs Committee Session 2008-09 HC 112, *Knife Crime*, (2009), at 12.

<sup>572</sup> J.Thurnherr et al. ‘Youths Carrying a Weapon or Using a Weapon in a Fight: what Makes the Difference?’ (2009) 24(2) *Health Education Research* 270, at 270.

<sup>573</sup> Stephen mentions several strategies that young people employ in self-protection, such as grouping together in gangs. D.E.Stephen ‘Time to Stop Twisting the Knife: a Critical Commentary on the Rights and Wrongs of Criminal Justice Responses to Problem Youth in the UK’, *op cit* fn 554 at 195.

<sup>574</sup> D.Shaw et al. *op cit* fn 523 at 270.

<sup>575</sup> G.A.Mauser ‘Do Restrictive Firearm Laws Improve Public Safety?’ (2012) 24 *Journal on Firearms & Public Policy* 188, at 188.

<sup>576</sup> A.Murdie ‘Fifty Years of Offensive Weapons’ (2003) 167 *Criminal Law and Justice Weekly* (formerly *Justice of the Peace*) 308, at 308.

assist the state with peace-keeping.<sup>577</sup> On the contrary, a civilised society with institutional support from law enforcement officers<sup>578</sup> arguably should not require the possession of weapons on the streets for the securement of collective order, or to keep the peace. In fact, the presence of weapons in public is considered to achieve the opposite effect, namely that of public disorder. Murdie compares the situation before and after the enactment of legislation: ‘*modern English hooligans were meagerly armed compared with their forebears who had routinely carried swords, axes ... and all manner of hunting and farming implements in the cause of personal offence and defence*’.<sup>579</sup> This indeed may be true, although a number of frightening weapons such as machetes are occasionally carried on the streets even in current times.<sup>580</sup> The context and circumstances have changed, and such behaviour is no longer considered acceptable due to the serious, extensive social harm it could potentially cause.<sup>581</sup>

Alongside the social changes, and perhaps partly responsible for the change of attitude is the increase in legal regulation. A new landscape of criminal offences has emerged over the eras in relation to weapons. As Husak notes ‘*most of the people sentenced to jail today are incarcerated for conduct that was not even criminal a century ago*’.<sup>582</sup> There are many prohibitions in this area within the laws of England and Wales.<sup>583</sup> The Prevention of Crime Act 1953 (to be considered shortly) ‘*was created under the presumption that banning weapons from all civilians, regardless of their intention, from public places would reduce violent crime ... The Act was passed in response to the large rise in violent crime in the United Kingdom*’.<sup>584</sup> The Act was the first clear step towards prohibiting the carrying of personal weapons. Earlier

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<sup>577</sup> J.L.Malcolm *Guns and Violence: The English Experience*, *op cit* fn 359 at 4, 45 and 47.

<sup>578</sup> *ibid* at 173.

<sup>579</sup> A.Murdie ‘Fifty Years of Offensive Weapons’, *op cit* fn 576 at 308. He refers in particular here to the Prevention of Crime Act 1953.

<sup>580</sup> *BBC News*, ‘Machete Found Inside Youth’s Jacket in Ballymena’, (21 Feb 2012), <http://www.bbc.co.uk/news/uk-northern-ireland-17114422> (accessed on 20/07/12). See also the earlier reference to the case of the murdered soldier in Woolwich on page 105.

<sup>581</sup> The notion of social harm will be explored in section 3.2.4.

<sup>582</sup> D.Husak ‘Criminal Law Theory’ in M.P.Golding & W.A.Edmundson (eds) *The Blackwell Guide to the Philosophy of Law and Legal Theory*, (Blackwell Publishing, Oxford, 2006), at 109. Indeed, the research of Chalmers and Leverick echoes this statement, as they have found a significant rise in the number of criminal offences that are created, suggesting some truth in claims of over-criminalization in contemporary society. J.Chalmers & F.Leverick ‘Tackling the Creation of Criminal Offences’ (2013) 7 *Criminal Law Review* 543, at 560.

<sup>583</sup> D.Shaw et al. *op cit* fn 523 at 271.

<sup>584</sup> A.Dhanoa et al. ‘Possession of Offensive Weapons’, (*Westlaw UK Topics Latest Update*, 20 June 2013).

legislation governing the use of weapons was already in existence, although not directed at the carrying of weapons on the person specifically, such as the Explosive Substances Act 1883.

The Act of 1953 triggered vigorous debate in Parliament. Many contested the provision against the carrying of weapons, claiming it to be an encroachment of the right to self-defence, and that its only result would be to make it a crime for people to be placed in a position to protect themselves.<sup>585</sup> Although the discussions attempted to clarify the position, explaining that it would be permissible to carry an article for a defensive purpose if necessary, this was not evident from the wording of the Act itself. Many cases questioning the interpretation and intention of Parliament have since arisen.<sup>586</sup>

The same kinds of arguments raised remain true today, for example, that people should be able to prepare to protect themselves without facing punishment. However, Murdie claims that despite the obvious fact that the legislation has resulted in many convictions, it has also clearly prevented far more incidents of serious violence facilitated by weapons from being committed in the first place.<sup>587</sup> This suggests that the legislation serves its purpose as a deterrent to the carrying of offensive weapons, and articles with blades or sharp points. It is submitted that it was necessary to implement the legislation as a positive step towards controlling potentially lethal situations. Nevertheless, it may be that submitting that the Act represents a deterrent to the carrying of offensive weapons would be unsubstantiated and premature, considering the fact that many individuals who decide to arm themselves with weapons do so regardless of the law. These actions cannot be so easily deterred.

There is certainly a strong attempt at deterrence within the legislation. Prohibiting the carrying of knives and other weapons is a matter of public interest and importance. Therefore, the law is spread across a number of varying statutes, targeting different weapons and circumstances. The statutes governing the possession, sale and use of

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<sup>585</sup> D.Shaw et al. *op cit* fn 523 at 272-275.

<sup>586</sup> Such as *Harrison v Thornton* [1966] Crim. LR 388. The case involved the picking up of a stone, which was regarded as an offensive weapon, despite not being carried by the defendant, but merely used as a weapon of opportunity. This will be further discussed below.

<sup>587</sup> A.Murdie 'Fifty Years of Offensive Weapons', *op cit* fn 576 at 308.

offensive weapons, include the Explosive Substances Act 1883 (mentioned earlier); the Firearms Act 1968; the Offensive Weapons Act 1996; and the Knives Act 1997.<sup>588</sup> However, the most important Acts in relation to this research and what is termed ‘offensive weapons’ in particular, are the aforementioned Prevention of Crime Act 1953, and the Criminal Justice Act 1988.<sup>589</sup> Both provisions are phrased slightly differently to sanction different actions and will be introduced separately. As will be seen shortly, especially in relation to their potential defences, their application will be similar.

### **3.2.1 The Prevention of Crime Act 1953**

As noted earlier, section 1(1) of the Prevention of Crime Act 1953 states that “*any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence*”.<sup>590</sup> The section has several conditions: (i) lack of lawful authority or reasonable excuse; (ii) possession in a public place; and (iii) of an offensive weapon. The term ‘lawful authority’ generally refers to those with statutory authority to possess such articles, for example the police carrying truncheons in the course of their duties to maintain public order and protection. The term ‘reasonable excuse’ provides a potential defence to the offence committed under the section, and will be explored in more detail shortly.<sup>591</sup> The term ‘public place’ is easily comprehensible, meaning any area that the public can generally access, either freely or by paying a fee.<sup>592</sup> Additionally, it is necessary to consider the meaning of the term ‘offensive weapon’. The term is defined in the statute in section 1(4) as “*any article made or adapted for use for causing injury to the person, or intended by the person having it with him for such use by him or by some other person*”.<sup>593</sup>

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<sup>588</sup> Other relevant statutes include: the Restriction of Offensive Weapons Act 1959 and the Public Order Act 1994.

<sup>589</sup> These statutes were also the focus in the author’s article, F.Llewelyn, *op cit* fn 494.

<sup>590</sup> The Prevention of Crime Act 1953, section 1(1).

<sup>591</sup> In section 3.4 of this chapter.

<sup>592</sup> For example, shopping centres, museums or cinemas. The public place criterion will be discussed in section 3.4 and in Chapter 6.

<sup>593</sup> The Prevention of Crime Act 1953, section 1(4).

The offence and its definition have produced several cases requiring statutory interpretation. On several occasions, the courts have had to consider the intention of Parliament in enacting this legislation. It is evident from this provision,<sup>594</sup> that despite the intrinsically innocent nature of an article, it has the potential to be defined as an ‘offensive weapon’ according to the intentions of the carrier. The case of *Harrison v Thornton*<sup>595</sup> employed a rigid interpretation of the provision, holding that even picking up a stone in order to inflict an injury was regarded as an offence under the 1953 Act. However, this interpretation ignores the wording of the statute of ‘having it with him’,<sup>596</sup> and the decision in that case may have construed the legislation too narrowly. It is thus doubtful that this is an accurate application of the law.<sup>597</sup>

The 1953 Act classifies three different types of weapons in its definition of offensive weapon in section 1(4): those that are made to cause injury, those adapted to cause injury, and those intended to cause injury. In the case of *R v Simpson*<sup>598</sup> the Court of Appeal analysed the wording of the definition, describing the first classification as being offensive *per se*. This indicates that the inherent nature of the object is that of a weapon, for example, ‘*a bayonet, a stiletto, or a hand-gun*’.<sup>599</sup> The second classification was again explained by way of examples, namely that of ‘*the broken bottle deliberately broken in order that the jagged end may be inserted into the victim’s face*’,<sup>600</sup> or ‘*a potato with a razor blade inserted into it*’,<sup>601</sup> transforming an innocent object into a potential weapon. The third category can be considered a weapon or not depending on the intentions of the carrier at the time, for example a hammer in the case of *Yaman*.<sup>602</sup> If there is a pre-meditation that the article could be used offensively then it could fall within the remit of the provision. However, in order for the offence to be committed, the offensive intention must be formed before the

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<sup>594</sup> The Prevention of Crime Act 1953, section 1(1).

<sup>595</sup> *Harrison v Thornton*, *op cit* fn 586.

<sup>596</sup> As required by section 1 (4) of the 1953 Act, quoted above.

<sup>597</sup> A.Murdie ‘Fifty Years of Offensive Weapons’, *op cit* fn 576 at 308.

<sup>598</sup> *R v Simpson* [1983] 3 All ER 789.

<sup>599</sup> *ibid.*

<sup>600</sup> *ibid.*

<sup>601</sup> A.Dhanoa et al. *op cit* fn 584.

<sup>602</sup> *R v Yaman* [2012] EWCA Crim 1075. In this case a shopkeeper passed his property and believed there were burglars on the premises. He had mistaken the situation and attacked the men with a hammer. In fact, the intruders included a warrant officer, gas engineer and locksmith, who were in the property to turn off the gas supply due to non-payment of bills. The defendant’s conviction of offensive weapon possession was quashed due to misdirection by the trial judge. However, his conviction for wounding with intent to inflict grievous bodily harm was upheld.



weapon is used.<sup>603</sup> If no such intention has been formed, an innocent article should not be considered an offensive weapon.<sup>604</sup>

### **3.2.2 The Criminal Justice Act 1988**

The Criminal Justice Act 1988 differs from the previous Act as it is targeted towards articles with blades or sharp points. It is therefore a separate provision to prohibit such items. The offence is set out in section 139:

*‘(1) Subject to subsections (4) and (5) below, any person who has an article to which this section applies with him in a public place shall be guilty of an offence.*

*(2) Subject to subsection (3) below, this section applies to any article which has a blade or is sharply pointed except a folding pocketknife.*

*(3) This section applies to a folding pocketknife if the cutting edge of its blade exceeds 3 inches.*

*(4) It shall be a defence for a person charged with an offence under this section to prove that he had good reason or lawful authority for having the article with him in a public place.*

*(5) Without prejudice to the generality of subsection (4) above, it shall be a defence for a person charged with an offence under this section to prove that he had the article with him — (a) for use at work; (b) for religious reasons; or (c) as part of any national costume’.*

This is a detailed provision that identifies specific and clear exceptions to the general prohibition against carrying articles with blades or sharp points in the section. Such exceptions refer to the type of article, for example, exempting folding pocketknives, depending on the length of the blade.<sup>605</sup> A defence is listed, namely that of ‘good reason’. Examples that could constitute a ‘good reason’ are suggested, such as for use at work. The Act of 1988 is clearly relevant to the present study, as crimes involving knives, and knife possession offences, are far more common in the UK than crimes involving other weapons. Many other types of weapons are carried and used, but *‘although other weapons – such as baseball bats, screwdrivers, and chains – are also carried, by far the most common weapons are knives’*.<sup>606</sup> Compared to the items

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<sup>603</sup> A.Murdie ‘Fifty Years of Offensive Weapons’, *op cit* fn 576 at 308.

<sup>604</sup> D.J.Baker, *op cit* fn 466, at 697.

<sup>605</sup> See subsection 3 of the provision.

<sup>606</sup> E.Hern W.Glazebrook & M.Beckett ‘Editorial: Reducing Knife Crime: We Need to Ban the Sale of Pointed Kitchen Knives’ (2005) 330 *BMJ* 1221, at 1221. Dogs have even been used on occasions as weapons in attacks: *The Guardian*, ‘Killer who Used Dog as Murder Weapon Jailed for Life’, (19

listed, knives stand out as being easier to conceal and to offer better injury inflicting prospects.

Additionally, the easy access to knives makes them the most commonly carried and used weapons in the UK. According to a report by the World Health Organization, this is a common position across Europe: *'Knives and other sharp implements are commonly available in most countries, are the most commonly used weapon in most countries and are involved in about 40% of homicides among young people in the region'*.<sup>607</sup> The choice of knives as weapons may be compared to the wider use of firearms in the US for example.<sup>608</sup> This is due to the UK's strict licensing laws, which means that guns are less accessible to the general public,<sup>609</sup> and makes crimes involving these weapons less prominent than they would be in the US. Public opinion and the approach to legal control are obviously different;<sup>610</sup> the law is far more liberal in the US concerning the carrying of weapons, (specifically guns where it is recognised as a Constitutional right),<sup>611</sup> than in the UK.

Indeed, it is often said that the UK has one of the strictest approaches to weapons regulation, receiving strong criticism from gun liberalists.<sup>612</sup> The restrictive legal approach is criticised for the lack of autonomy it extends to its subjects, and for placing victims in a weak position to defend themselves. An individual merely attempting to take precautionary defensive measures may face criminal liability.

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March 2010), <<http://www.guardian.co.uk/uk/2010/mar/19/dog-killer-chrisdian-johnson-sentence>> (accessed on 07/04/12). Another weapon that has become more common for use in attacks is acid, which has devastating and permanent effects on victims. See J.Robinson 'Acid Attacks on the Rise in UK, According to Victim Report Figures', (*The Guardian*, 10 April 2014), <<http://www.theguardian.com/uk-news/2014/apr/10/acid-attacks-uk-rise-gangs>> (accessed on 04/03/15).

<sup>607</sup> D.Sethi et al (eds), *op cit* fn 495 at 3.

<sup>608</sup> For example, Malcolm notes that approximately 200 million American citizens own firearms. J.L.Malcolm *Guns and Violence: The English Experience*, *op cit* fn 359 at 5.

<sup>609</sup> A.Silvestri et al. *op cit* fn 564 at 10.

<sup>610</sup> *ibid.*

<sup>611</sup> 'A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed'. U.S. Const. am 2. The amendment has generated significant debate over its interpretation, with conflict arising between the individual rights theory and the collective rights theory. See the Legal Information Institute at Cornell University Law School, *Second Amendment*, <[https://www.law.cornell.edu/wex/second\\_amendment](https://www.law.cornell.edu/wex/second_amendment)> (accessed on 25/07/15); *District of Columbia v Heller* 128 S. Ct. 2783 (2008), at 2799; L.Zbrzezny, *op cit* fn 200 at 232-233; and P.J.Charles "'Arms for their Defence'?: an Historical, Legal, and Textual Analysis of the English Right to Have Arms and Whether the Second Amendment should be Incorporated in *McDonald v. City of Chicago*' (2009) 57 *Cleveland State Law Review* 351, at 352-353.

<sup>612</sup> For example, a firearms license certificate must be obtained in the UK to legally own a gun, and in order to obtain a license, individuals must prove they have a 'good reason' for its possession.

Ashworth highlights the harsh nature of the law of England and Wales in relation to gun control. He explains that the main offences indicate strict liability, operating without the usual requirements of *mens rea*, presumption of innocence, and proportionate sentencing expected by criminal law.<sup>613</sup> The nature of the offence means that it is committed as soon as the requirements of the Act are met, with no need for a criminal intention, and an instant appearance of guilt.<sup>614</sup> It matters not whether the individual is aware that he is committing an offence.<sup>615</sup>

While many ordinary people are unaware of such legislation, for example taking large kitchen knives with them on picnics, it appears likely that those who carry such articles for defensive purposes, such as gang members, have greater awareness of the illegality of their actions. Applying strict liability to such offences can be described as a zero tolerance approach, and a method of deterring the undesirable behaviour of carrying weapons. On one hand, it would be unfortunate in the former case for an innocent family or group of friends to be punished while having a picnic, as although possessing a dangerous article, their intention for its use is solely in relation to assisting with their food preparation. On the other hand, the legislation is necessary to prevent the latter kind of case, where knives are carried perhaps only with the intention to frighten or deter trouble, but with the knowing potential for use against a person if needs must.

### **3.2.3 Emphasising the objectives of the legislation**

The purpose and aim of the 1953 Act have been emphasised by the courts on several occasions.<sup>616</sup> It has been stressed that '*the Act of 1953 never intended to sanction the permanent carriage of an offensive weapon merely because of some enduring supposed or actual threat or danger to the carrier*'.<sup>617</sup> This evidently proves that the provision attracts a rigid interpretation.

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<sup>613</sup> A.Ashworth 'Editorial: Firearms and Justice' *op cit* fn 19 at 447; A.Ashworth 'Conceptions of Overcriminalization' (2008) 5 *Ohio State Journal of Criminal Law* 407, at 420.

<sup>614</sup> G.P.Fletcher *Rethinking Criminal Law*, *op cit* fn 70 at 198-199.

<sup>615</sup> Lacey argues that the harshness of strict liability offences is mitigated by the availability of general defences, but as already mentioned, it is unlikely that self-defence will provide a defence to possession offences. N.Lacey 'Space, Time and Function: Intersecting Principles of Responsibility across the Terrain of Criminal Justice' (2007) 1 *Criminal Law and Philosophy* 233, at 241.

<sup>616</sup> The same objectives are also apparent in relation to the 1988 Act.

<sup>617</sup> *Evans v Hughes* [1972] 1 WLR 1452, at 1455.

In considering the reasonableness of possession during a trial, the court must consider three factors: first, the intention of the carrier at the time; second, the circumstances surrounding the offence; and third, the nature of the weapon concerned.<sup>618</sup> The consideration of these factors creates an obstacle for people who arm themselves regularly to undertake criminal activities.<sup>619</sup> It was stated in the case of *Taikato* that ‘the legislator did not intend that criminals, hoodlums or members of street gangs should be free to carry prohibited weapons because they had a well-founded fear of attack from other criminals hoodlums or street gangs’.<sup>620</sup> It is necessary to restrict the defence of ‘reasonable excuse’ in this way, because the purpose of the provision is to keep weapons off the streets, and to deter a culture of carrying weapons. Interpreting the provision more liberally would be problematic and would undermine its authority. Smith has demonstrated that the legislation would be defeated if ‘everyone who reasonably feared that he might be attacked at some time was allowed to carry an offensive weapon. However good the motives of the carriers, the more weapons that are carried on the streets, the greater is the chance that they will be used’.<sup>621</sup> This is a reasonable deduction and represents the role of the criminal law in shaping and deterring certain behaviours.

The issue of the carrying of offensive weapons was addressed in the case of *R v Felix Densu*,<sup>622</sup> where the defendant was charged with possessing an offensive weapon contrary to section 1(1) of the Prevention of Crime Act 1953. The article in question was a metal telescopic extendable baton, which he claimed he had found, and did not know was a weapon. Appreciating the seriousness of the offence, the court held that lack of knowledge did not constitute a reasonable excuse for the purposes of satisfying the defence according to the Act.<sup>623</sup> Thus, a balance must be struck between the competing interests of public safety, and an individual’s right to defend oneself. If too lenient an approach is taken it risks defeating the object of legislating to prohibit

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<sup>618</sup> CPS, *Offensive Weapons, Knives, Bladed and Pointed Articles: Legal Guidance*, <[http://www.cps.gov.uk/legal/1\\_to\\_o/offensive\\_weapons\\_knives\\_bladed\\_and\\_pointed\\_articles/index.html](http://www.cps.gov.uk/legal/1_to_o/offensive_weapons_knives_bladed_and_pointed_articles/index.html)> (accessed on 05/05/12).

<sup>619</sup> This point was emphasised in the case of *R v Taikato* (1996) 186 CLR 454.

<sup>620</sup> *ibid.*

<sup>621</sup> J.C.Smith, *Justification and Excuse in the Criminal Law*, (The Hamlyn Lectures, London, Stevens and Sons Ltd, 40th series, 1989), at 48-49.

<sup>622</sup> *R v Felix Densu*, *op cit* fn 493.

<sup>623</sup> *ibid.*, at 404-405.

the possession of offensive weapons, while on the other hand, if the approach applied is too harsh, it might deny people the availability of the defence, despite the fact that they acted reasonably in the circumstances.

The difficulty is that these offences have the potential to cause public fear and injury, but are essentially just that, a potential danger not yet materialised. Naturally, this makes the preventative task of control challenging to achieve and target effectively. This involves consideration of the level of harm that must be caused before a conduct will be criminalised.<sup>624</sup> The issues posed by the harms of weapons possession is illustrated in the Court of Appeal's decision in four combined appeals:

*“every weapon carried about the streets, even if concealed from sight, even if not likely to be or intended to be used, and even if not used represents a threat to public safety and public order ... when considering the seriousness of the offence courts should bear in mind the harm which the weapon might foreseeably have caused”.*<sup>625</sup>

It appears here that what might happen, as a potential future harm is the key component of such offences. With these offences, the primary objective is to secure the safety of the public. Guidelines published by the Crown Prosecution Service explain that where the first part of the two-stage prosecution test is reached (the evidential hurdle), the second part (the public interest component) will normally require a prosecution. Additionally, the sentence would need to be carefully considered to ensure that it reflects the seriousness of the offence.<sup>626</sup> It is clear that the appropriate legal approach is to target possession offences through the criminal justice process, even if no physical harm is caused. This attempts to deter more serious crimes, such as actual bodily harm or grievous bodily harm, from being committed. By approaching these offences in this way, the legal system is acknowledging the gravity of possession offences.<sup>627</sup>

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<sup>624</sup> This is discussed below at section 3.2.4.

<sup>625</sup> *R v Povey, R v McGeary, R v Pownall and R v Bleazard* [2008] EWCA Crim 1261.

<sup>626</sup> CPS, *Offensive Weapons, Knives, Bladed and Pointed Articles: Legal Guidance*, *op cit* fn 618.

<sup>627</sup> *R v Mario Rolando Celair, Sarah Jane Poulton* [2003] 1 Cr App R (S) 116, at 616. The Court of Appeal acknowledged in this case that a careful balancing act is required between the fact that no physical harm is caused, and the potential harms that could result from possession offences.

### **3.2.4 Harm and offensive weapons**

Offences involving the possession of offensive weapons clearly create an increased risk to others. Such crimes often do not inflict harm to a specific person, but rather, represent a threat to everyone in the vicinity. The activity is prohibited and rendered criminal because of the potential danger that it creates, as opposed to the actual harm that it inflicts. This is an example of the balancing of harm to the individual and harm to society. Public interests, and public harms are wide in scope, not specifically identifiable other than by posing a risk to anyone who is in the vicinity of the dangerous conduct at the time it occurs.<sup>628</sup> Fletcher notes that more prohibitions and greater punishment are reasonable when a public interest is under threat, as ‘the need for social protection may dictate a higher punishment in this situation’.<sup>629</sup> This point is illustrated by the example of possessing an offensive weapon in a public place, as this conduct risks causing public harms. While individuals might feel that to secure their safety they require a weapon, as its possession increases the danger to society, the balance falls in favour of protecting society as opposed to a non-identified individual, who may or may not encounter a situation necessitating self-defence.

Possession offences are sometimes referred to as victimless crimes. As with many drug offences, there are no individuals identified in the circumstances that regard themselves as victims, but there is a significant risk of harm to others.<sup>630</sup> With the example of drugs offences, the only persons who could be considered as victims have in fact chosen the action. Another example arises in cases where people request assistance to die. When someone decides to terminate their own life (and would commit suicide independently if they were able bodied), if another individual provides assisted suicide after succumbing to their pleas and demands, the death would arguably not produce a victim.<sup>631</sup> Again, the reasoning here is that the person

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<sup>628</sup> J.Feinberg, *op cit* fn 58 at 222-223.

<sup>629</sup> G.P.Fletcher ‘What Is Punishment Imposed For?’ (1994) 5 *Journal of Contemporary Legal Issues* 101, at 102.

<sup>630</sup> A.Ashworth & J.Horder, *op cit* fn 18 at 38-39.

<sup>631</sup> For a discussion on this, see G.Williams ‘Assisting Suicide, the Code for Crown Prosecutors and the DPP’s Discretion’, *op cit* fn 55 at 198.

suffering the harm of death has chosen of their own will to end their life in this way.<sup>632</sup>

Despite the perceived appropriateness of the term “victimless” within the examples above, there is a compelling argument against the use of the term. Only actions that do not give rise to any harm at all can truly be victimless. Most proscribed actions, or conduct that is viewed with disapproval, are criminalized due to the fact that they cause a degree of harm.<sup>633</sup> This harm might not be to a specific, identifiable individual or groups of society; it can merely present a risk to all people, or the state, or to corporate entities.<sup>634</sup> It is therefore difficult to imagine a crime, which does not cause any harm at all, as even the mere possession of offensive weapons create a risk and a corresponding potential of harm.<sup>635</sup> While the conduct of possession itself may not be harmful, it has the potential to be very dangerous, requiring criminalisation.<sup>636</sup> It is even harder to imagine a victimless crime considering the fact that the perpetrator can become his own victim; if he is the only person that could possibly be harmed by his conduct, his actions cannot be held to be victimless.<sup>637</sup> Within the same appreciation of the harm principle, even a fully consenting adult can be harmed by the actions of another, despite his consent to the activity - thus, again falling beyond the notion of a victimless crime.<sup>638</sup>

Following this assessment, it is difficult to maintain the notion that there are instances involving offensive weapons that do not create victims. Although no fixed individual, or group of people, are directly harmed by the act of possessing a weapon, the

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<sup>632</sup> This is of course a simplification of the matter for illustration purposes only. This notion will be disproved on the following page, where it is shown that the victim can in fact be a victim of himself.

<sup>633</sup> Nevertheless, Stewart claims that harm alone is insufficient to explain criminalization, and claims that an interference with rights is also engaged. Namely, as well as causing harm, the action must interfere with a right possessed by everyone by virtue of being human. H.Stewart ‘The Limits of the Harm Principle’ (2010) 4 *Criminal Law and Philosophy* 17, at 17-18.

<sup>634</sup> A.Ashworth & J.Horder, *op cit* fn 18 at 38-39.

<sup>635</sup> V.Tadros ‘Harm, Sovereignty, and Prohibition’ (2011) 17 *Legal Theory* 35, at 43-46.

<sup>636</sup> A.Ashworth & J.Horder, *op cit* fn 18 at 38-39.

<sup>637</sup> An unique example arose in relation to possession of a weapon in a public place for self-harm in the case of *R v Bown* [2003] EWCA Crim 1989. For further discussion of this case, see below on page 145. Although there is certainly a victim of self-harm, there is no corresponding crime committed for self-harm or even attempted suicide.

<sup>638</sup> Consider for example the case of *R v Brown* [1993] 2 All ER 75 regarding the irrelevance of consent to charges of assault occasioning actual bodily harm (section 47 of the Offences Against the Person Act 1861), and unlawful wounding, (section 20 of the Offences Against the Person Act 1861) arising from consensual sado-masochistic relations.

potential for societal harm is substantial. The notion of a societal harm can be described as being a:

*‘collection of specific interests of the same kind possessed by a large and indefinite number of private individuals ... produced by generally dangerous activity that threatens no specific persons nameable in advance, but almost anyone who happens to be in a position to be affected. These activities produce some common danger to all the members of the community’.*<sup>639</sup>

Public interests, and public harms are therefore wide in scope, not specifically identifiable other than by posing a risk to anyone who is in the vicinity of the harmful conduct at the time it occurs. Considering also that the perpetrator can be a victim of his own actions,<sup>640</sup> it is hard to maintain the view that such crimes are ever truly victimless. At the very least, an individual who decides to carry a weapon is putting his interest of liberty at risk of being set back,<sup>641</sup> as if he is caught in possession, he will be punished and may be deprived of his liberty by being incarcerated, a potential harm in itself.

The law on weapons regulation is therefore a perfect example of harm prevention. The very decision to prohibit possession of dangerous articles is a specific step to reduce crime, and thus, to reduce harm or the potential to cause harm. However, by regulating such activity, liberty is taken away from individuals, and the entire population. This is potentially an obstacle for the perceived sense of safety of those who live in dangerous environments, where they constantly fear for their lives.<sup>642</sup> While this can be considered unfair to people in such circumstances, the gains of avoiding harms to the masses outweigh the arguments of the minority. It is therefore clear why this behaviour must attract criminalisation, as the potential harms outweigh the restriction of autonomy to carry weapons. While personal autonomy is a right encompassed under Article 8 of the ECHR, it is merely a qualified and not an

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<sup>639</sup> J.Feinberg, *op cit* fn 58 at 222-223.

<sup>640</sup> For an interesting discussion on the harm of self-sacrifice, see V.Tadros ‘Harm, Sovereignty, and Prohibition’, *op cit* fn 635 at 53.

<sup>641</sup> See Chapter 1, section 1.4.1, above for more discussion on harm as a setting back of one’s interests.

<sup>642</sup> A.Ashworth ‘Conceptions of Overcriminalization’, *op cit* fn 613 at 415-416.



absolute right.<sup>643</sup> The State is therefore permitted to restrict the exercise of such rights when necessary.<sup>644</sup>

This is reflected by Feinberg's treatment of the control of handguns. He says that the banning of such dangerous articles, which have severe, irremediable consequences when used, effectively prevents '*thousands of accidental and deliberate maimings and killings*'.<sup>645</sup> Clearly the benefits gained are so substantial and attractive that the prohibition is warranted and necessary. Some people who require such articles to protect themselves may well be trustworthy and upstanding members of the community, who would not harm anybody, other than in a situation of self-defence. However, the dangers of making such dangerous weapons widely available, is that for every responsible individual who possesses them, there will be a dangerous individual who should never be granted permission to possess such articles. Thus, in order to protect everyone, regulation must be universal. As Feinberg proclaims, '*if the state prohibits these persons from possessing handguns, it must tell them, in effect, that they cannot do something which is harmless, because others cannot be trusted to do the same thing without causing grievous bodily harm*'.<sup>646</sup> There is potential for abuse of licenses permitting the possession of weapons, as some individuals will undeniably fall through the net or obtain illegal weapons instead. On the whole, however, such licenses are worthwhile as they provide an extra measure of safety for the public from the dangers posed by widespread weapons ownership.

It is almost obvious to say that '*other things being equal, it is worse to engage in action that brings about greater compared with lesser harm*',<sup>647</sup> and this is true in the context of offensive weapons. It is necessary to deter people from carrying offensive weapons as they increase the dangers for everyone. Such activity provides opportunities for serious crimes; it facilitates criminal behaviour that would not otherwise be possible, and thus must be restricted and controlled. The carrying of

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<sup>643</sup> It is stated in Article 8(2) of the ECHR that '*There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*'.

<sup>644</sup> See section 5.1.4 in Chapter 5 for a discussion on autonomy and privacy.

<sup>645</sup> J. Feinberg, *op cit* fn 58 at 194.

<sup>646</sup> *ibid* at 194.

<sup>647</sup> D. Rodin 'Justifying Harm', *op cit* fn 150 at 82.

weapons presents unacceptable and unjustifiable risks to the whole of society, while arguably only providing a false sense of security to one individual.<sup>648</sup> The balance clearly tilts towards the protection of the majority, even if this is done at the expense of the minority. This reasoning follows the approach of utilitarian thinking, which prioritises the greatest good for the greatest number.<sup>649</sup> As Fletcher says, ‘*the mere act of possession causes no harm - though it may generate a risk of accidental discharge or of purposeful misuse*’;<sup>650</sup> it is a violation of the law and a harm in itself.

The levels of potential risks involved can increase depending on the nature of the weapon, as some weapons are far more dangerous than others. As will be seen, there is no concept of a defensive weapon in law, thus a defensive purpose does not excuse the possession of a lethal weapon.<sup>651</sup>

### **3.3 The Nature of the weapon**

The nature of the weapon is an instrumental consideration, as varying levels of dangerousness can influence the reasonableness of its possession for self-defence. This point is emphasised by Loveless: “*when it comes to the legality of carrying around, for example, pepper sprays, knuckle dusters, truncheons for use in case of attack, none would be lawful in the absence of a specific threat of a specific, imminent attack*”.<sup>652</sup> The reason for this is that these articles are offensive *per se*; they are intrinsically offensive, as they have been made for the purpose of causing injury to the person.<sup>653</sup> These categories of weapons are inherently dangerous and are capable of producing fatal results. Some weapons are particularly problematic due to their nature. For example, firearms are placed at the upper end of intrinsically dangerous weapons. The advantage of firearms for the defender is that they facilitate a defence from a safe distance. However, the strength of the weapon for defensive purposes is

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<sup>648</sup> As demonstrated by the earlier discussion in the present chapter on pages 115-116, which illuminated the fact that carrying a weapon places the carrier at an increased risk of becoming a victim himself, thus, the act of carrying a weapon can be regarded as providing a false sense of security. See also page 153.

<sup>649</sup> Utilitarianism was briefly mentioned in Chapter 2. See section 2.2.3 on consequentialism.

<sup>650</sup> G.P.Fletcher ‘What Is Punishment Imposed For?’, *op cit* fn 629 at 106.

<sup>651</sup> D.Lanham ‘Offensive Weapons and Self-defence’ *op cit* fn 10, at 86.

<sup>652</sup> J.Loveless *Criminal Law: Text, Cases and Materials*, (3rd edn, Oxford University Press, Oxford, 2012), at 492.

<sup>653</sup> Such articles or items clearly satisfy the definition provided by section 1(4) of the Prevention of Crime Act 1953.

also its downfall. While firearms enable greater scope for successful self-defence, they also present an increased level of danger generally, whether carried in public or used in the home,<sup>654</sup> due to their force and the distance at which they are effective.

However, other articles that have not been created for the purpose of causing injury are also capable of devastating effects when used as weapons. For example, there are many dangerous household items, such as kitchen knives, that are used on a day-to-day basis and pose a risk beyond their designed use. It can be argued that because of their easily accessible nature, they pose an even greater danger. Indeed, they account for many of the cases involving young people, as they can easily be acquired from their homes. The effectiveness of laws prohibiting sale to under eighteen year olds is therefore questionable in this respect.<sup>655</sup> Such articles are especially problematic when taken out of their natural context. While knives would require the aggressor and defender to be in close proximity before they could be used offensively,<sup>656</sup> they increase the risk of injury to severe levels. Even if intended merely as a mode of defence, the carrying of knives in public presents a danger to both the carrier and the general public. Failure to use such weapons effectively for defensive purposes could also have a fatal result for the defender, and entails a significant risk.

As expressed in the case of *Evans v Hughes*,<sup>657</sup> the law does not recognise the concept of a defensive weapon. Even if possessed for defensive purposes, the article remains an offensive weapon.<sup>658</sup> This is an important point, as the carrying of weapons for protection is incompatible with the legal position. However, in certain circumstances it could be permissible to use a weapon for the purposes of self-defence, but this is problematic. As Murdie states, '*Given the prohibition in law against excessive force, the use of a weapon with an honest intention of personal preservation may be considered disproportionate to the danger ... simple possession may be put forward as an intention to engage in unlawful violence outside the justification of self-defence*'.<sup>659</sup> There have been many cases where this issue has arisen, requiring careful

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<sup>654</sup> See for example the discussion in Chapter 4, section 4.3.3, on the case of Anthony Martin.

<sup>655</sup> Section 43 of the Violent Crime Reduction Act 2006 amends section 141 of the Criminal Justice Act 1988, by increasing the prohibited age of sale of knives from sixteen to eighteen years of age.

<sup>656</sup> B.Sangero *Self-Defence in Criminal Law*, *op cit* fn 73 at 155.

<sup>657</sup> *Evans v Hughes*, *op cit* fn 617.

<sup>658</sup> D.J.Baker, *op cit* fn 466, at 696.

<sup>659</sup> A.Murdie 'Fifty Years of Offensive Weapons', *op cit* fn 576 at 308.

consideration of the circumstances in each instance to determine whether or not self-defence is a reasonable excuse.

The plea of self-defence failed in the case of *R v Spanner*,<sup>660</sup> which involved the prosecution of a security guard who carried a truncheon with him to defend himself in the course of his duties. He was not permitted to do so as part of his uniform, and therefore failed to secure a defence by lawful authority or reasonable excuse. The actions of the defendant in this case reflects the perception that high risk occupations entitle individual workers to carry weapons, but this is not something which an individual can personally decide, without law enforcement authority. Even the carrying of weapons by the police is heavily regulated. Only authorised firearms officers may carry firearms; rules state which ‘less lethal options’ may be executed, such as tazers, and guidelines are provided on how to assess whether the use of force is reasonable in the circumstances.<sup>661</sup>

The impact that the type of weapon has on the reasonableness of its possession is illustrated in the case of *Ford v Lindholm*,<sup>662</sup> where it was stated that it is not permissible for persons to carry knives with them for self-defence. It is obviously doubtful whether there can ever be a reasonable excuse for carrying a knife in public, because of the gravity of the damage that may be caused by its use and presence on the streets.<sup>663</sup> This is a pivotal consideration when it comes to the issue of sentencing these crimes.

The case of *R v Davis*<sup>664</sup> is interesting in this context, as originally the trial judge considered that a screwdriver could be regarded as a bladed article for the purposes of the 1988 Act. An appeal was allowed on the basis that section 139 of the 1988 Act

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<sup>660</sup> *R v Spanner* [1973] Crim LR 704.

<sup>661</sup> College of Policing, *Use of Force, Firearms and Less Lethal Weapons*, [Internet], 2013, <<https://www.app.college.police.uk/app-content/armed-policing/use-of-force-firearms-and-less-lethal-weapons/>> (accessed 25/08/15).

<sup>662</sup> *Ford v Lindholm* (1987) 45 SASR 445.

<sup>663</sup> Accordingly, in the relatively recent case of *R v Choung* [2013] EWCA Crim 1716, while self-defence was pleaded with regard to the offences of wounding with intent and violent disorder, it was not raised as a defence to the offence of possessing an offensive weapon. The case involved the possession of a knife which was subsequently used in a street fight. The fact that the defendant submitted a guilty plea to the possession offence demonstrates that self-defence is not considered an appropriate defence for the carrying of knives in public.

<sup>664</sup> *R v Davis* [1998] Crim. LR 564.

was deemed to cover knives and sharply pointed instruments and that a screwdriver did not fall within this category. The language of the Act was considered to refer to articles with a cutting edge, and not as the judge had suggested, to any article capable of causing injury, so the wording was to be ascribed its literal meaning.<sup>665</sup> This is perhaps surprising as it seems that the purpose of both the 1953 and 1988 Acts is to deter the carrying of weapons because of the harms that doing so could cause. Yet, in this case, it appears that the capability to cause injury is not the defining feature of these offences, as this would give the provision far too broad an ambit. Perhaps rightly, a screwdriver is not a bladed article under the 1988 Act, but would it not therefore possibly be better placed as an offensive weapon, according to the Act of 1953 instead?<sup>666</sup> According to the learned judges in the case on appeal, this would not be appropriate in this instance as the Prevention of Crime Act 1953 ‘*limited itself to objects made or intended for the purpose of causing injury*’,<sup>667</sup> and therefore would not apply in this case, as the screwdriver fell outside its scope.<sup>668</sup>

It is partly due to the fact that legislation governing the prohibition of offensive weapons does not refer to self-defence specifically,<sup>669</sup> that it is difficult to assess to what degree self-defence applies as a defence to weapons offences. Therefore, whether or not the defence is available is likely to turn on the specific circumstances of individual cases, and will be decided on a case-by-case basis. The legislation does however contain generally worded defences, such as ‘reasonable excuse’ and ‘good reason’, which are capable of covering actions of private defence which is the next topic for consideration.

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<sup>665</sup> J.C.Smith ‘Case Comment: *R v Davis*: Bladed Articles: Whether Screwdriver a Bladed Article for the Purposes of s.139’ (1998) *Criminal Law Review* 564, at 564.

<sup>666</sup> In determining which offence is appropriate, the prosecution will bring cases involving anything classed as an offensive weapon, (namely, an article made, adapted or carried with the intention of causing injury), under the Prevention of Crime Act 1953, and any object which has a blade or is sharply pointed will be charged under the Criminal Justice Act 1988.

<sup>667</sup> *R v Davis*, *op cit* fn 664.

<sup>668</sup> This demonstrates the important role of statutory interpretation by the courts, but also highlights the flaws within its practice when the black letter of the law is followed without consideration of the broader context and purpose of the legislation.

<sup>669</sup> D.Lanham ‘Offensive Weapons and Self-defence’ *op cit* fn 10, at 85.

### **3.4 Statutory defences – ‘reasonable excuse’ and ‘good reason’**

Both the Acts of 1953 and 1988 include exceptions to the offences for which they prescribe, thereby offering potential defences for their commission. These defences are similar in both provisions although the wording varies slightly. The Prevention of Crime Act 1953 provides an opportunity to prove that there was a ‘reasonable excuse’ for possessing the weapon in question,<sup>670</sup> while the Criminal Justice Act 1988 requires one to have ‘good reason’ for possessing bladed articles.<sup>671</sup> Despite the variation in their construction, these defences are generally applied and interpreted in the same manner,<sup>672</sup> although it has been debated whether this is the appropriate approach. For example, Ormerod states that case law addressing the ‘reasonable excuse’ defence for offences involving offensive weapons could provide a persuasive precedent, and be influential upon considerations of the ‘good reason’ defence in cases involving bladed articles.<sup>673</sup> Indeed, it was confirmed by the court in *R v McAuley*,<sup>674</sup> with reference to the earlier case of *R v Jolie*,<sup>675</sup> that there was ‘*no distinction between “good reason” in the one statute and “reasonable excuse” in the earlier one*’.<sup>676</sup>

Contrarily, Finn claims that the good reason defence has a much ‘tighter interpretation’ than that of reasonable excuse.<sup>677</sup> Smith shares this view, and claims that ‘*it is understood that this is not an accidental difference but that “good reason” was intended to imply a narrower defence than reasonable excuse*’.<sup>678</sup> Therefore, having a reasonable excuse does not necessarily equate to having a good reason. Smith’s comments were made with regard to the earlier case of *R v Emmanuel*,<sup>679</sup> where the defendant was convicted of having a bladed article in a public place, when

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<sup>670</sup> Prevention of Crime Act 1953, section 1, on the ‘Prohibition of the carrying of offensive weapons without lawful authority or reasonable excuse’.

<sup>671</sup> Criminal Justice Act 1988, section 139 (4), ‘*It shall be a defence for a person charged with an offence under this section to prove that he had good reason or lawful authority for having the article with him in a public place*’.

<sup>672</sup> D.Ormerod ‘Case Comment: *R v Clancy*: Possession of a Bladed Article: Defence - Having Good Reason for Being in Possession of Article in Question’ (2012) *Criminal Law Review* 549, at 551.

<sup>673</sup> D.Ormerod ‘Case Comment: *R v McAuley*: Trial - Having a Bladed Article - Statutory Defence of “Good Reason”’ (2010) *Criminal Law Review* 336, at 338.

<sup>674</sup> *R v McAuley* [2010] 1 Cr. App. R. 11.

<sup>675</sup> *R v Jolie* [2003] EWCA Crim 1543.

<sup>676</sup> *R v McAuley*, *op cit* fn 674.

<sup>677</sup> M.Finn ‘Comment: Under the Knife’ (2009) *Law Society Gazette* 8, at 8.

<sup>678</sup> J.C.Smith ‘Case Comment: *R v Emmanuel*: Offensive Weapon - Having Article with Blade in Public Place’ (1998) *Criminal Law Review* 347, at 347.

<sup>679</sup> *R v Emmanuel* [1998] Crim. L. R. 347.

he was found with a knife in his shoe. Despite Smith's view that the defences do not necessarily carry the same construction, in the same case comment on *Emmanuel*,<sup>680</sup> he concedes that no apparent difference was drawn between the two defences in that particular case.<sup>681</sup>

A potential reason for the distinctions in the language used for the separate defences may relate to the statement of the court in *R v Davis*,<sup>682</sup> (discussed in section 3.3). The court stated that the 1953 Act is aimed at weapons made or intended for the purpose of causing injury, while the 1988 Act is merely targeted towards articles which have blades or which are sharply pointed. It is therefore both the manufacturing purpose and intention which sets them apart. While the former are designed, modified or intended for the purpose of causing injury, the latter are not so made, adapted or intended, but may cause injury to the person. This is a fine distinction, and it is not obvious that the test of reasonable excuse under the 1953 Act should attract a wider ambit than that of 'good reason' under the 1988 Act as a response to these linguistic nuances. For the purposes of this study and on the tenets of the later, more recent, case law interpretations, unless stated otherwise in specific instances, the two defences will be treated as having the same requirements and meaning.

In relation to their ascribed meaning, the case of *R v Manning*<sup>683</sup> is regarded as the authority for the principle that the words 'good reason' do not require any judicial gloss, as it is an ordinary phrase and a part of everyday language.<sup>684</sup> It was stated later in *R v Jolie*<sup>685</sup> that the factual nature of these defences is a key factor in their application, '*the whole point is that they are infinitely context-sensitive, and should be left so*'.<sup>686</sup> Thus, the wording of the defence is stated quite clearly, and the common law interpretation appears to have reached a conclusive understanding that they are ordinary terms for the deliberation of the jury. It was recently confirmed in the case of

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<sup>680</sup> *ibid.*

<sup>681</sup> J.C.Smith 'Case Comment: *R v Emmanuel*: Offensive Weapon - Having Article with Blade in Public Place', *op cit* fn 678.

<sup>682</sup> *R v Davis*, *op cit* fn 664. For discussion, see section 3.3.

<sup>683</sup> *R v Manning* [1998] Crim. L. R. 198.

<sup>684</sup> The same may accordingly be said with regard to 'reasonable excuse'.

<sup>685</sup> *R v Jolie*, *op cit* fn 675.

<sup>686</sup> Case Comment: *R v Jolie & R v Manning*: Having Bladed Article - Criminal Justice Act 1988, s.139 - "Having With Him" (2003) 5 *Archbold News* 2, at 3.

*R v Clancy*,<sup>687</sup> that the defence of ‘good reason’ is a question of fact for the jury to consider, and that it is to be given its natural and ordinary meaning, therefore not requiring further judicial explanation.

Notably, the case of *Clancy*<sup>688</sup> involved a woman who had carried two knives in her bag due to fear after an alleged attack on her by a taxi driver. Surprisingly, the court regarded that fear of attack could be a ‘good reason’ under section 139(4) of the 1998 Act.<sup>689</sup> This is a significant finding considering that fear is the main reason for weapons carrying. Fear is closely tied to protection, as fearing a future attack or realisation of a threat, influences individuals to carry weapons for their own protection. Clough agrees that this is a significant result, and states that the case provides a welcome clarification of the law.<sup>690</sup> However, this assertion of clarity may be overly optimistic. As will become evident, the circumstances will dictate whether or not a good reason will be constituted by fear of attack alone. It is not simply a matter of saying that fear of attack may be a sufficient reason, as there will generally be an additional requirement for a degree of imminence to be present in relation to that fear of attack.

### **3.4.1 Imminence and the importance of the circumstances**

The requirement of imminence has already been mentioned in Chapter 2 on self-defence. It is particularly relevant to the possession of offensive weapons, as forearmament may be regarded as preparatory or pre-emptive action in self-defence. Although such actions are sometimes permitted, it is crucial that the defender does not act too soon, otherwise the defence might not be available.<sup>691</sup> Ashworth claims that ‘*the law should require a greater restraint and sense of proportion from an individual who has forearmed himself*’<sup>692</sup> because of the need to disprove any doubt about premeditation and to ensure that the defendant was indeed acting in self-defence. This is the reason why there must usually be evidence of an imminent, specific threat

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<sup>687</sup> *R v Clancy* [2012] EWCA Crim 8.

<sup>688</sup> *ibid.*

<sup>689</sup> *ibid.*

<sup>690</sup> J.Clough ‘Court of Appeal: The Role of Subjectivity in Determining ‘Good Reason’ to Possess a Bladed Article: *R v Clancy* [2012] EWCA Crim 8’ (2013) 77(3) *Journal of Criminal Law* 180, at 180.

<sup>691</sup> B.Sangero *Self-Defence in Criminal Law*, *op cit* fn 73 at 155.

<sup>692</sup> A.Ashworth ‘Self-Defence and the Right to Life’, *op cit* fn 243 at 299.



before pre-emptive action may be taken for self-protection. Alexander compellingly notes that '*self-defence is always pre-emptive. That is, we employ self-defensive force before the attack we fear has fully materialized*'.<sup>693</sup> His statement is realistic and logical. Before any self-defensive act is carried out, the defender must make a decision to act, and at what point to react. Waiting too long could be detrimental to a person's defence. The reason pre-emption is relevant is the proximity of the defence to the attack. While every defence entails a degree of pre-emption, the level and extent of preparation makes a difference to the reasonableness of the action. The context for the defensive action is therefore a central consideration, and the circumstances require careful consideration to detect a sufficient level of imminence.

Although many would argue that it is morally wrong to carry weapons in public, the circumstances surrounding the possession of an offensive weapon are important when considering potential defences. It is necessary to assess the offender's motive at the time, to discover why he chose to carry the weapon. In *R v Morse*<sup>694</sup> it was held that the use of a razor in reaction to a fist fight was not reasonable, especially as the defendant carried it with him as a matter of course and did not happen to pick it up in the heat of the moment. The intention did not respond to a threat or attack, rather, it was a matter of regular occurrence that the defendant carried the prohibited article, which cannot be considered as reasonable behaviour. Similarly, in the case of *R v Field*,<sup>695</sup> it was considered important to the reasonableness of the use of a knife, to question whether the knife was carried as a matter of course, whether it was carried upon the knowledge that an attack was imminent, or whether it was picked up as an instinctive reaction to an active threat. These nuances are essentially the difference between an offence and a defence, between an unacceptable decision and a good reason. They are crucial considerations when evaluating the availability of the defence, as '*the decision to carry a weapon negatives the suddenness and unpreparedness which form part of the paradigm of self-defence*',<sup>696</sup> and may appear to be a calculated act of criminal intent.

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<sup>693</sup> L.Alexander 'A Unified Excuse of Preemptive Self-protection', *op cit* fn 132 at 1476.

<sup>694</sup> *R v Morse* (1910) 4 Cr App R 50.

<sup>695</sup> *R v Field*, *op cit* fn 138.

<sup>696</sup> A.Ashworth 'Self-Defence and the Right to Life', *op cit* fn 243 at 298.

The court stated in *R v Peacock*,<sup>697</sup> that it must be a very rare case that someone carrying an offensive weapon in case they may be attacked could plead self-defence without evidence of an imminent attack. The defendant in *Peacock*<sup>698</sup> was denied the defence for carrying a knife out of fear that he may be involved in a fight with a rival group, which was not a good reason for its possession. It is interesting to ask just what may be permitted as a 'very rare case'? There is no real indication from the common law that such an exception could be sanctioned.<sup>699</sup>

The *Attorney-General's Reference (No 2) of 1983*<sup>700</sup> case recognised a situation of rioting as being exceptional. Would this perhaps include the rioting and looting crisis in London and other English cities in the summer of 2011 as special cases?<sup>701</sup> The social developments during that time could potentially have provided a reasonable excuse for persons to possess offensive weapons on the streets because of the high risk of attack and strong sense of fear within communities. The difficulty in such a circumstance would be differentiating between those possessing weapons for the purpose of self-protection, and those possessing weapons to facilitate their criminality. In reality, that is always where the difficulty lies, in distinguishing between lawful and unlawful instances of weapons carrying.

The facts of the *Attorney-General's Reference (No 2) of 1983*<sup>702</sup> case were that the defendant was charged with making a petrol bomb, an explosive substance, contrary to the Explosive Substances Act 1883. He claimed that he did so in order to protect his business premises from rioters, which was a lawful object under the legislation, and the defence was successful.<sup>703</sup> This was expressed to be an exceptional case which distinguished actions taken in self-defence from preparatory actions, noting that the possession of the explosives was unlawful until the moment they were required for use in self-defence of an imminent attack. The court stated that '*In our*

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<sup>697</sup> *R v Peacock* [1973] Crim LR 639.

<sup>698</sup> *ibid.*

<sup>699</sup> Even cases involving 'battered women', which stand out as exceptional and special cases, often fail to be included under the defence of self-defence. See fn 16 for literature discussing this point.

<sup>700</sup> *Attorney-General's Reference (No 2) of 1983* [1984] QB 456.

<sup>701</sup> *BBC News UK*, 'London Riots: Timeline and Map of Violence', (15 August 2011), <<http://www.bbc.co.uk/news/uk-14436499>> (accessed on 09/08/11).

<sup>702</sup> *Attorney-General's Reference (No 2) of 1983* *op cit* fn 700.

<sup>703</sup> He had committed another offence under the Explosive Substances Act 1875 of manufacturing and storing explosives without a license.

*judgement a defendant is not left in the paradoxical position of being able to justify acts carried out in self-defence but not acts immediately preparatory to it ... He may still arm himself for his own protection, if the exigency arises, although in so doing he may commit other offences*'.<sup>704</sup> The reference to 'other offences' here indicates that possession of the explosives prior to the need for use, or after a threat has passed, would be unlawful. Therefore, despite the lawfulness of using such weapons for protection if the exigency arises, any possession beforehand remains an offence. This authority suggests that possessing weapons can only be acceptable when there is an imminent threat of attack,<sup>705</sup> emphasising the importance of the requirement of imminence.

Without some element of imminence or immediacy of an attack, it would most likely never be possible to rely on self-defence as a complete justification for possessing an offensive weapon. This condition is important because *'the very pre-emptiveness of the strike implies that the threat being averted was not 'live'*',<sup>706</sup> and it is crucial to identify whether the possession, or defensive force was required at all, in order to satisfy the test of reasonableness and claim self-defence. Because of the gravity of the potential harm that may be inflicted by certain weapons, if carried, they will require greater proof of the imminence of harm in order for their possession to constitute a reasonable excuse or good reason.

The requirement of imminence was narrowly met in the case of *Evans v Hughes*.<sup>707</sup> The defendant in this case had carried a metal bar with him for protection, and was charged with possessing an offensive weapon contrary to the 1953 Act. He had carried the article since being attacked during the previous week, as he feared he would be victimised again. This is a rare and exceptional case, as he was held to have a reasonable excuse. Despite having a reasonable excuse on this occasion, the court questioned the reasonableness of his actions a week after suffering an attack. The imminence here was rather distant, and it was therefore regarded as a borderline case.

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<sup>704</sup> *Attorney-General's Reference (No 2) of 1983* *op cit* fn 700 at 471.

<sup>705</sup> A.Ashworth *Principles of Criminal Law*, (6th edn, Oxford University Press, Oxford, 2009), at 119-120.

<sup>706</sup> J.Slater, *op cit* fn 78 at 143.

<sup>707</sup> *Evans v Hughes*, *op cit* fn 617.

Indeed, it is possible that the same decision would not have been reached had the possession been discovered a month, or even a week later than it was.

In the more recent case of *N v DPP*,<sup>708</sup> the appellant had carried a metal bar with him five minutes after he had been in a confrontation with a group of men. He claimed that he had a reasonable excuse for possessing the weapon because he feared an imminent attack. He attempted to rely on *Evans v Hughes*<sup>709</sup> as an authority for construing five minutes as being ‘*well within the margin of “imminence”*’.<sup>710</sup> This argument was rejected by the Divisional Court, which maintained that it is a matter for the jury to determine how imminent and likely an attack must be in order to provide a good reason for possessing a weapon. The former case had not made the test of anticipation of an imminent attack a part of the statute, and was distinguished as there was no evidence in *N v DPP*<sup>711</sup> that an attack was likely. The men did not appear to be in pursuit of the defendant and had driven away. The threat had passed, and the defendant had not seen any weapons in their possession which would have justified his own possession. Despite the *prima facie* similarities of these cases, (the possession of a metal bar as a weapon, and the fear of an attack following a particular incident), the case of *Evans v Hughes*<sup>712</sup> was distinguished. The lack of evidence indicating a risk of an imminent attack denied a ‘reasonable excuse’ in *N v DPP*.<sup>713</sup>

The defendant in *N v DPP*<sup>714</sup> also claimed in his appeal against conviction that the test of self-defence should apply in his case. The contention was that the action of carrying a weapon in anticipation of an imminent attack was one of pre-emptive self-defence, and the circumstances should therefore be considered subjectively as the defendant believed them to be at the time, as is the test with self-defence. However, this argument was again rejected. It was held that there was no authority for a subjective assessment of ‘reasonable excuse’, and the judgement emphasised the fact that the tests and burdens of proof are very different for these defences. While in self-defence the burden of proof lies on the prosecution to prove that the defence is not

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<sup>708</sup> *N v DPP* [2011] EWHC 1807 (Admin).

<sup>709</sup> *Evans v Hughes*, *op cit* fn 617.

<sup>710</sup> *N v DPP*, *op cit* fn 708.

<sup>711</sup> *ibid.*

<sup>712</sup> *Evans v Hughes*, *op cit* fn 617.

<sup>713</sup> *N v DPP*, *op cit* fn 708.

<sup>714</sup> *ibid.*

available to the defendant, with reasonable excuse it is the defendant that must prove both his belief, and the reasonableness of his belief, on the balance of probabilities.

The case of *R v Clancy*<sup>715</sup> also discussed the comparison between self-defence and the defences of reasonable excuse and good reason, when the argument arose that the ‘jury should have been directed to reach their decision relying on the appellant’s own view of the situation’<sup>716</sup> as would be the case with self-defence. However, the court dismissed this claiming that ‘there is no true analogy between self-defence and the defences of reasonable excuse and good reason because the legal principles and the burden of proof are different’.<sup>717</sup> There are nevertheless, notable similarities.

In principle, there are similarities between the imminence requirement before force may be used in self-defence, and the imminence requirement applied to an attack triggering fear and influencing a decision to carry a weapon. However, it seems that the manner in which they will be assessed must remain different. For a ‘reasonable excuse’ or a ‘good reason’ for possessing an offensive weapon or bladed article to be proved, the entire circumstances will be fully considered. While that is also true of a case involving pre-emptive self-defence, a distinction appears in relation to the perspective from which those circumstances are examined. For self-defence, a degree of subjectivity is considered as the circumstances are viewed according to the defender’s belief at the time.<sup>718</sup> On the other hand, with possession offences and their statutory defences, generally, the analysis will be objective.

However, this does not mean that the defender’s state of mind is completely irrelevant, and that there is no room for a degree of subjectivity in the assessment at all. As held in the case of *Clancy*,<sup>719</sup> the very fact that fear of an attack can constitute a good reason means that the decision cannot be entirely objective, as the nature of fear is that individuals subjectively feel or experience it.<sup>720</sup> It can therefore be argued

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<sup>715</sup> *R v Clancy* *op cit* fn 687.

<sup>716</sup> *ibid.*

<sup>717</sup> *ibid.*

<sup>718</sup> As discussed in Chapter 2, these circumstances are then considered according to the objective reasonable person standard.

<sup>719</sup> *R v Clancy* *op cit* fn 687.

<sup>720</sup> D.Ormerod ‘Case Comment: *R v Clancy*: Possession of a Bladed Article: Defence - Having Good Reason for Being in Possession of Article in Question’, *op cit* fn 627 at 550.

that there is uncertainty within the law in this area. Although some judgements clearly draw a distinction between the tests for the statutory defences of reasonable excuse and good reason, and that for self-defence, in other decisions the line between these objective and subjective elements is far less prominent. This makes the tasks of predicting outcomes and finding an absolute authority on this matter difficult. Considering that the very nature of a question of fact means that different courts and juries may reach different decisions to others, the circumstances can be greatly varied.

When considering imminence within the circumstances, timing appears to be a vital consideration regarding these defences, as is clear from the cases of *Evans v Hughes*<sup>721</sup> and *N v DPP*.<sup>722</sup> The defences of ‘good reason’ and ‘reasonable excuse’, relate to the time at which the defendant carried an offensive weapon or bladed article. The case of *R v Giles*<sup>723</sup> involved the carrying of a multi-purpose utility tool, which included a prohibited blade, and was therefore contrary to the 1988 Act. It was held that the fact that the article included non-prohibited features did not provide a defence of ‘good reason’ for possessing the article. Although the defendant had used the knife earlier in the evening while at home to assist with renovation work, he had placed it back in a pouch on his belt, not intending to use it as a weapon, and gone out to a public place. The timing was thus an important matter, as his reason for use earlier at home did not extend to the time at which it was found in his possession.

The case of *Giles*<sup>724</sup> was commented upon in *Archbold News*, questioning whether the jury should in fact be left to consider that a good reason could be found through the intention of carrying such an item for a legitimate purpose.<sup>725</sup> This review highlights the dilemma raised through the example of a pair of scissors in a manicure set carried as a matter of course for accessibility and convenience when needed. It contends that according to the decision in *Giles*,<sup>726</sup> the defence of good reason might require the owner of the manicure set to have an intention to cut their nails on the very occasion

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<sup>721</sup> *Evans v Hughes*, *op cit* fn 617.

<sup>722</sup> *N v DPP*, *op cit* fn 708.

<sup>723</sup> *R v Giles* [2003] EWCA Crim 1287.

<sup>724</sup> *ibid.*

<sup>725</sup> Case Comment: *R v Giles*: Having a Bladed Article – Criminal Justice Act 1988, s.139 – Defence of “Good Reason” (2003) 5 *Archbold News* 3, at 3.

<sup>726</sup> *R v Giles* *op cit* fn 723.

that the scissors are discovered.<sup>727</sup> That seems preposterous, taking the intention of the statute too far. It seems that one must either reconsider what they perceive to be reasonable and legitimate actions, and follow the exact letter of the law, (in which case the defence of good reason is practically redundant), or on the other hand, to rely on the discretion of the police and prosecution in deciding whether an offence has been committed.<sup>728</sup> This is an exaggerated interpretation of the provision and is in conflict with the aim of the legislation, which is to minimise the risks presented by the carrying of *dangerous* articles.

Again on the issue of the importance of timing to such defences, it was held on appeal to the Court of Appeal that the act of armament in *R v Emmanuel*<sup>729</sup> was capable of being considered as an act of self-defence. The defendant had been convicted of having a bladed article in a public place, which was a knife that he had in his shoe. He carried the knife due to fear of a resumed attack following an incident that occurred only half an hour before the defendant was found in possession of the article. Therefore, despite the fact that his defence was relatively weak, the judge should have left self-defence as a good reason for the determination of the jury, and the appeal was permitted on the basis of the misdirection.<sup>730</sup> This is in contrast to the case of *N v DPP*<sup>731</sup> where the decision and distinction related to the lack of evidential risk of an imminent attack in the case. The question of imminence of attack and reasonableness of the belief should have been open to consideration by the jury in *Emmanuel*,<sup>732</sup> rather than being declined as a good reason by the judge.

Another relevant but much older case is *Evans v Wright*<sup>733</sup> in which a man was stopped while driving and was found to have a knuckleduster and a truncheon in his possession. Charged under the 1953 Act, he argued that he used the car to collect large sums of money to pay wages, and that he carried these articles with him for

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<sup>727</sup> Case Comment: *R v Giles*: Having a Bladed Article – Criminal Justice Act 1988, s.139 – Defence of “Good Reason”, *op cit* fn 725.

<sup>728</sup> *ibid.*

<sup>729</sup> *R v Emmanuel*, *op cit* fn 679.

<sup>730</sup> J.C.Smith ‘Case Comment: *R v Emmanuel*: Offensive Weapon - Having Article with Blade in Public Place’, *op cit* fn 678.

<sup>731</sup> *N v DPP*, *op cit* fn 708. The case of *Emmanuel* was not considered in this case, perhaps due to the fact that it involved an offence under the 1988 Act as opposed to the 1953 Act.

<sup>732</sup> *R v Emmanuel* *op cit* fn 679.

<sup>733</sup> *Evans v Wright* [1964] Crim LR 466.

protection. At the time they were found in his possession, he was not collecting wages, and therefore lacked a reasonable excuse. The element of reasonableness is concerned with the time at which the weapon is carried, and so similarly, the defence of self-defence failed for lack of reasonable excuse in *Grieve v Macleod*.<sup>734</sup>

### **3.4.2 The relevance of self-defence to the statutory defences**

In theory, self-defence could provide ‘reasonable excuse’ for carrying articles contrary to the 1953 Act, or ‘good reason’ for possessing articles contrary to the 1988 Act.<sup>735</sup> Therefore, it could be a potential defence to the offence of possessing an offensive weapon. However, as will become evident shortly in the discussion in section 3.5 on self-defence, a reasonable excuse was lacking in the case of *Butler*,<sup>736</sup> where the purpose of self-defence and carrying the item as a matter of necessity was not enough to justify the possession of the article in that particular case. It is difficult to know just what might constitute a reasonable excuse in this context. Most people carry weapons for protection, but the courts have taken a strict approach on this matter, and fearing an attack at some point in the future is not sufficient by itself to provide a reasonable excuse. This is a key point regarding the interplay between the different defences of self-defence, reasonable excuse and good reason and what satisfies their tests.

The same is true regarding the difficulty of determining what falls within the terms reasonable excuse and good reason as that of self-defence, and many cases have discussed what kind of justifications are capable of satisfying these provisions. The case of *R v McAuley*<sup>737</sup> confirmed previous decisions that a good reason could be found if the defendant had carried a knife for protection and was able to prove, on the

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<sup>734</sup> *Grieve v Macleod* [1967] Crim LR 424. A taxi driver carried a two foot piece of rubber with a metal tip in his car and was charged with carrying an offensive weapon in a public place. He argued that taxi drivers were sometimes assaulted at night and that he had it with him for protection, but he had not satisfied the requirement of reasonable excuse, as an attack was not imminent at the time he was found in possession of the article.

<sup>735</sup> Clear evidence of an imminent attack will be required before the defence may be engaged. It was confirmed in *R v Archbold* [2007] All ER (D) 76 (Aug) that a ‘reasonable excuse’ for carrying an offensive weapon could be satisfied by fear of an imminent attack and a defensive purpose.

<sup>736</sup> *R v Butler* [1988] Crim LR 695. As will shortly be explained, the case involved an elderly man who had carried a sword-stick with him to assist him whilst walking, and when faced with a threat of attack, he had used the article in self-defence.

<sup>737</sup> *R v McAuley*, *op cit* fn 674.



balance of probabilities, that he feared an imminent attack at the time. The facts of the case were that the defendant had been stabbed by a man in January 2008 in Brixton, and upon seeing him again in May of that year in the same area was again approached and threatened by him. Therefore, the next time he travelled to Brixton, he decided to arm himself with a knife in case he encountered him again. The judge had ruled that fear of attack in such a situation did not constitute a good reason because ‘*if this was a good reason, knife-carrying could be carried out by virtually anybody in the Brixton area*’.<sup>738</sup> However, his appeal against conviction was permitted, because a fear of attack could potentially be a good reason, and the judge should have heard the evidence before making such a declaration. As decided in *R v Bown*,<sup>739</sup> ‘*a court should be slow to rule that the evidence was, as a matter of law, incapable of amounting to the s.139 (4) defence*’.<sup>740</sup>

The facts of *Bown*<sup>741</sup> are fairly unique in that a knife was carried for the purposes of self-harm. The defendant argued that this was a good reason for its possession, and that he was accordingly not guilty of the offence of its possession. It was held that there was insufficient evidence to support the defendant’s claim to allow his appeal against conviction. However, the trial judge had been wrong to declare that self-harm was incapable of being a good reason for possessing the bladed article in a public place.<sup>742</sup> If protecting the public is the objective of legislating to prohibit weapons possession, it seems that this instance falls outside the direct intention of Parliament. If the defendant only intends to harm himself, his actions would not present a danger to others. Therefore a claim of possession for the purpose of self-harm has the potential to provide a good reason.

It is for the judge to decide whether or not a reason is capable of being a good reason, and for the jury to consider whether it is adequate on the facts of the case. However, ‘*where ordinary English words are used in a statute, a judge should be slow to rule that the particular facts cannot as a matter of law fall within the scope of a “good*

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<sup>738</sup> *ibid.*

<sup>739</sup> *R v Bown* *op cit* fn 637.

<sup>740</sup> *ibid.*

<sup>741</sup> *ibid.*

<sup>742</sup> F.Page & A.Ashworth ‘Case Comment: *R v Bown*: Possession of a Blade’ (2004) *Criminal Law Review* 67, at 68.

reason”.<sup>743</sup> The judge’s role can be considered fairly difficult in this regard, as it is a matter of interpretation. This undoubtedly means that different people will have different views, and concluding that self-harm is not a good reason for possessing a bladed article in a public place might also have been considered sensible by others. After all, as previously mentioned, the presence of any weapons in public presents a potential danger.

The matter is further complicated by the fact that it is not merely the need to find a good reason for possessing the article in question that is considered, but rather that there is a good reason for its possession in a public place.<sup>744</sup> The public place requirement will be discussed further in Chapter 4 as it will be necessary to compare the law’s approach to self-defence in public and private spaces.<sup>745</sup>

The specification of public places is closely linked to the issue of forgetfulness. This connection is based on the fact that often individuals use articles at home or at work, where it is lawful to do so, but thereafter forget that it remains in their possession when leaving the property. Thus, the matter arises whether a reasonable excuse or good reason for its possession can be found by way of forgetfulness.

The potential for forgetfulness to provide a defence to weapons possession has arisen in case law, and was deliberated in the case of *DPP v Gregson*.<sup>746</sup> The defendant had used a knife at his work and forgotten that it remained in his pocket six days later while he was not at work. It was held that forgetfulness did not constitute a good reason.<sup>747</sup> Although he had a good reason for its possession six days earlier, he lacked a good reason at the time it was found in his possession.<sup>748</sup> Comparatively more

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<sup>743</sup> Case Comment: *R v Jolie & R v Manning*: Having Bladed Article - Criminal Justice Act 1988, s.139 - “Having With Him”, *op cit* fn 686 at 2.

<sup>744</sup> *R v Bown* [2004] 1 Cr. App. R. 13.

<sup>745</sup> See section 4.3.1. This will also be developed in Chapter 5.

<sup>746</sup> *DPP v Gregson* [1993] 96 Cr. App. R. 240.

<sup>747</sup> *ibid.*

<sup>748</sup> S.Mercer ‘Divisional Court - A Good Reason for Having an Offensive Weapon: *DPP v Gregson*, *Godwin v DPP*, *Harris v DPP*, *Fehmi v DPP*’ (1993) 57 *Journal of Criminal Law* 308, at 308. In the case of *Godwin*, the defendant was found with a kitchen knife in a public place and claimed he was merely moving it to his new home. This was rejected as a ‘good reason’ as he had drawn the knife when he saw one of his adversaries. Both the cases of *Harris* and *Fehmi* involved the possession of ‘lock-knives’, and discussed whether such an article was covered by the provision in section 139 of the Criminal Justice Act 1988. The argument was raised that the articles in question were folding knives, therefore falling under the statutory exception, but the court rejected this argument.

recently, the case of *R v Jolie*<sup>749</sup> also discussed the issue of forgetfulness, with the trial judge holding initially that forgetfulness could never amount to a good reason in such cases. However, an appeal was allowed on the basis that in terms of possession, the jury should be directed that the defence relies upon either the defendant's knowledge of the location of the article, or that he was responsible for placing it where it was found, even if he forgot about it sometime afterwards. Forgotten possession is still undoubtedly classed as possession.<sup>750</sup>

### **3.5 Offensive weapons, bladed articles and self-defence**

It has already been mentioned that the connection between crimes involving offensive weapons, bladed articles and the defence of self-defence is based on the fact that most people who carry weapons do so in order to protect themselves. Research by the Centre for Crime and Justice Studies in London has found that fear is the primary motivator for weapons carriers.<sup>751</sup> The study explains that fear is a much more common reason for possession than aggression or other motivational factors. The Offending Crime and Justice Survey ran from 2003-2006,<sup>752</sup> and the 2006 results found that among respondents who had admitted to having carried a weapon, 85 per cent explained that they had done so due to fear.<sup>753</sup> It may be deduced from these findings that on the whole, people carry weapons in order to facilitate self-defence against the threats that they fear.<sup>754</sup> The key factor is feeling unsafe and a need to carry something for self-protection.<sup>755</sup> Nevertheless, despite the relatively certain intentions of the offender being defensive, not aggressive, the ability to plead self-defence in such cases is unclear. At first instance, regarding the intention alone, it would appear that self-defence is potentially available. However, the complication arises due to the other requirements of self-defence, namely imminence of attack.

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<sup>749</sup> *R v Jolie*, *op cit* fn 675.

<sup>750</sup> F.Page & A.Ashworth 'Case Comment: *R v Jolie*: Possession of a Blade - Possession - Good Reason' (2003) *Criminal Law Review* 730, at 731.

<sup>751</sup> C.Eades et al. 'Knife Crime' A Review of Evidence and Policy, *op cit* fn 495 at 22.

<sup>752</sup> UK Data Service, Offending Crime and Justice Survey, <<http://discover.ukdataservice.ac.uk/series/?sn=2000042>> (accessed on 23/06/13).

<sup>753</sup> S.Roe & J.Ashe *Home Office Statistical Bulletin, Young People and Crime: Findings from the 2006 Offending, Crime and Justice Survey*, 15 July 2008, <<http://webarchive.nationalarchives.gov.uk/20110218135832/rds.homeoffice.gov.uk/rds/pdfs08/hosb0908.pdf>> (accessed 08/05/12), at 14.

<sup>754</sup> C.Eades et al. 'Knife Crime' A Review of Evidence and Policy, *op cit* fn 495 at, at 21; D.Sethi et al (eds), *op cit* fn 495 at v-vi.

<sup>755</sup> D.Shaw et al. *op cit* fn 523 at 269.

When an individual forearms oneself, this is a pre-emptive action that occurs before a situation necessitating self-defence has arisen.

As already seen, the law does not prohibit the use of a weapon in self-defence if there is a genuine need for it, and if it is reasonable in the circumstances to use one. This point was advanced by Beale who supported the view that weapons are permissible for use in self-defence, expressing that '*if nature has not provided the means for such resistance, art may; in short, a weapon may be used to effect the unavoidable necessity*'.<sup>756</sup> The case of *R v Butler*<sup>757</sup> is particularly intriguing in this context. Mr Butler used a sword-stick to assist him while walking. He was attacked by a youth on a train and in the circumstances he used the sword '*perfectly properly in self-defence*'<sup>758</sup> to stop the youth from strangling him. While he had a good reason for carrying a stick, this did not amount to a reasonable excuse for carrying a sword-stick. Although it was acceptable and justifiable for him to have used the article in the circumstances to protect himself, it was nevertheless illegal for him to carry the sword-stick up until the point at which it was reasonable to use it in self-defence. In this case, it was an offence to carry the article in public, as it was an offensive weapon *per se*.<sup>759</sup> However, it was not unreasonable to use the article in self-defence when the necessity arose.<sup>760</sup> While, Mr Butler had a defence to the act of wounding the youth, he remained accountable for the offence of possessing an offensive weapon.

The law appears contradictory here - while it may be justifiable to use a weapon in self-defence, an offence of possession will be committed until the moment it is required for self-defence. It seems unfair that one would remain liable for the lesser offence of possession, while being released from accountability for the use of the weapon in self-defence. Hsiao argues that such an approach '*though appearing to recognize the value of human life, actually cheapens it by disallowing the citizenry the ability to mount a reasonable defense of their own lives*'.<sup>761</sup> Providing that there is evidence of an imminent attack, self-defence can provide a reasonable excuse for

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<sup>756</sup> J.H.Jr.Beale 'Retreat from a Murderous Assault', *op cit* fn 183 at 577.

<sup>757</sup> *R v Butler* *op cit* fn 736.

<sup>758</sup> Case Comment: *R v Butler*: 'Offensive Weapon: Sword Stick - Offensive Per Se' (1988) *Criminal Law Review* 695, at 695.

<sup>759</sup> See section 3.2, which set out the definition.

<sup>760</sup> J.C.Smith, *Justification and Excuse in the Criminal Law*, *op cit* fn 621 at 118.

<sup>761</sup> T.Hsiao 'Bearing Arms in Self-defense: a Natural Law Perspective', *op cit* fn 344 at 119.

possessing an offensive weapon. However, in the absence of a clear threat the possession will be unreasonable and individuals are not permitted to carry weapons as a matter of precaution.<sup>762</sup>

There is a distinction to be drawn between resorting to using any accessible item at the moment of necessity, and carrying a weapon to ensure that if the need arises the individual would be able to use it for protection. It is ordinarily acceptable for a person to use a weapon of opportunity, namely anything that happens to be available to them at the time, where it is reasonable to do so. However, the situation involving an act of forearming involves premeditation and preparation, and is problematic. Smith famously illustrated this point in the following hypothetical scenario:

*'If I happen upon a bank robbery and, being shot at by one of the robbers, I pick up the revolver which has been dropped by a wounded policeman and, quite reasonably fire it in self-defence, I am surely not guilty of an offence under the Firearms Act 1968, section 1, of being in possession of a firearm without holding a firearm certificate - unless I retain possession of the revolver for longer than is reasonably necessary for the purposes of self-defence or the prevention of crime. It can hardly be the law that the circumstances might justify me in, or excuse me for, killing my assailant with the revolver and yet not justify or excuse my being in possession of it ... If an act is justifiable or excusable because done in self-defence or the prevention of crime, that ought to be a sufficient answer to a charge of any crime alleged to be involved in the doing of the act'.<sup>763</sup>*

The quote emphasises the contradictory nature of the law. The more serious action of using a weapon would be excused, while the less serious action of possession would be a punishable offence.<sup>764</sup> The argument made by Smith is that the defence should be permissible in relation to all offences that ensue; after all, it is as a matter of necessity for self-protection and protection of others that the offence is committed. The danger with allowing such an approach would be that some people would take advantage of the legal position. Individuals may carry weapons deliberately with intent for defensive use, knowing that the possession would be justified once defensive force became necessary. Persons who regularly engage in dangerous activities, such as gang behaviour, might receive no punishment, as they are constantly facing imminent

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<sup>762</sup> A.Dhanoa et al. *op cit* fn 584.

<sup>763</sup> J.C.Smith, *Justification and Excuse in the Criminal Law*, *op cit* fn 621 at 122/123.

<sup>764</sup> This illustrates the same position as the case of *Butler*, discussed on the previous page.

threats. With such an approach, one would have to be caught in possession when no threat appears likely, before being penalised for the offence of possession. This would encourage the carrying of weapons, as there would be no negative consequences. This runs contrary to the deterrence objective within the legislation.

Perhaps this complication could be addressed by applying different standards to preparatory weapons and weapons of opportunity.<sup>765</sup> While the former entails blame on the part of the offender, the latter can be justified as it is committed as a matter of human instinct in a moment of desperation. It is worth emphasising again the distinction between weapons of opportunity and preparatory weapons. Smith's scenario involves a weapon of opportunity with no deliberate act of forearming. In reality, these situations are diverse and encompass different intentions on the part of the defender. While the former example portrayed involves a merely instinctive reaction in the heat of the moment, and luck that a weapon of opportunity is close by, the latter situation is preceded by deliberation, preparation and pre-emption of a future attack. It must be conceded that the notion of a weapon of opportunity seems almost unavoidably hypothetical in itself, as the odds of finding oneself in a situation necessitating defensive action, and at the same time finding a weapon to use for this purpose are probably remote.<sup>766</sup>

This is problematic for self-defence. While in theory it is available for these offences, in practice, it rarely extends its protection to offensive weapons offences. Lanham argues that in order for the defence to apply in such cases, an understanding must be reached that the balancing scales tip in favour of the self-defensive actions rather than the risks posed by possession offences.<sup>767</sup> This involves a delicate balancing act to promote the welfare and safety of the individual, alongside the collective interests of society. When an article is picked up in the heat of the moment, as a weapon of opportunity, it is far easier to argue that the possession offence should be waived. However, it is a far greater challenge to argue the same in relation to a preparatory weapon, carried in case the necessity for defensive action arises. The danger posed by

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<sup>765</sup> See fn 496 for the author's definition of these terms.

<sup>766</sup> It is possible to imagine a scenario where an attack might occur in a hardware store, or in the kitchen of a public café, and the surroundings could naturally provide potential weapons for use in self-defence.

<sup>767</sup> D.Lanham 'Offensive Weapons and Self-defence' *op cit* fn 10, at 88.

this situation is clearly conveyed by Lord Woolf: ‘*The problem is that if a person arms himself with a knife and there is then an incident, it is all too easy for him to make use of the weapon in a way wholly disproportionate to the danger in which he finds himself*’.<sup>768</sup> Thus, waiving the possession offence when it is deliberately carried is more problematic, as it strengthens the defender’s position to a potentially disproportionate level, enabling use of far more force than might be sufficient to overcome the threat.

It must be seriously questioned whether self-defence should or should not provide a defence to possession offences. It currently appears that it does not, but if it were decided that the defence should be available for these offences, it should be expressly stated in statute. A self-defence exception could be added into the defences permitted under the Acts of 1953 and 1988,<sup>769</sup> and specified within the explanation of ‘reasonable force’ in section 78 of the Criminal Justice and Immigration Act 2008. This would enable the courts to interpret the legal position more consistently. As has been shown from case law examples such as *Attorney-General’s Reference (No 2) of 1983*<sup>770</sup> and *R v Butler*,<sup>771</sup> it is a contradiction that an individual could be released from the criminal liability arising from their use of force, and yet be punished for the lesser offence of possessing the weapon in question. The courts have generally approached this issue in a restrictive manner. Self-defence has not been regarded as a potential defence to the possession of an offensive weapon, although the defence may justify the use of the weapon. This approach indicates that it is unlikely that self-defence will provide a defence to a charge of possession.

It must be asked whether the preceding approach is the appropriate method to employ. Sangero regards this approach as correct, as he argues that self-defence is not an appropriate defence to possession offences.<sup>772</sup> His view is closely tied to the careful balancing act required between protecting the individual and the collective society. He believes that possession offences are not subject to the protection offered by self-defence. The reasons for this are premised on the lack of injury caused to the

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<sup>768</sup> *R v Hastings* [2003] EWCA Crim 3730, per Lord Woolf.

<sup>769</sup> The Prevention of Crime Act 1953, section 1; and the Criminal Justice Act 1988, section 139.

<sup>770</sup> *Attorney-General’s Reference (No 2) of 1983* *op cit* fn 700.

<sup>771</sup> *R v Butler* *op cit* fn 736.

<sup>772</sup> B.Sangero *Self-Defence in Criminal Law*, *op cit* fn 73 at 120-121.

aggressor, a non-identifiable individual victim, and the fact that the harm in such cases is suffered by society.<sup>773</sup> Under this reasoning, the defence can only be relevant if and when the weapon is used to inflict injury. Despite this compelling view, it is argued here that providing the requirements of self-defence are indeed met, and that there is a threat of imminent force against the defender, the defence may well be considered morally applicable in such a context. In such an instance, the defender's intent would not be unlawful, as it is solely focused on the securement of self-protection. Further support may be gained from appreciating that for the purposes of the common law, self-defence is occasionally permitted where conduct amounts to less than force, as was the circumstances in the petrol bomb case discussed earlier.<sup>774</sup>

When considering the availability of self-defence in relation to offences involving offensive weapons, the legal path is uncertain. Although the defence may apply in cases where the weapon has been used, the offence of mere possession is unlikely to be justified. While the defences of reasonable excuse or good reason may excuse a charge of possession, it would appear that fear and protection alone are unlikely to provide an excuse for carrying a weapon. This means that the most common motivations for carrying weapons, fear and protection, will sometimes fall short of any of the available defences. A more inclusive approach would be to ascertain the full circumstances of the case, and providing there is a genuine concern, the defence of good reason or reasonable excuse could be found. Such a position acknowledges that self-defence is probably not the appropriate defence for the offence committed, but permits a consideration of defensive intentions within the statutory defences. On the contrary to the current position, this suggestion offers a viable excuse for the fearful individual through the defences of 'reasonable excuse' or 'good reason'. This would not involve the extension of self-defence to possession offences. Rather, it would recognise that in cases where self-defence has justified the use of a weapon,

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<sup>773</sup> *ibid.* Sangero argues that the offence of possessing an offensive weapon would be better dealt with under the defence of necessity, as it does not in fact result in injury to the aggressor, and therefore cannot fall under the definition of self-defence. This also bears the advantage of denying a defence to murder, (as necessity does not excuse killings), which may be more appropriate if a person has forearmed themselves in case of attack.

<sup>774</sup> See fn 702.



that fact should provide compelling evidence of ‘good reason’ or ‘reasonable excuse’ to provide a defence to the offence of possession.<sup>775</sup>

Nevertheless, in considering fear and need for protection as potential reasons to reduce punishment for weapons offences, it is necessary to question whether or not the individual has caused the circumstances and need for defence. Thus, it is relevant to consider whether the decision to carry a weapon triggers an element of blame on the part of the defender.

### **3.5.1 Self-generated self-defence**<sup>776</sup>

This title refers to situations where the defendant is partially to blame for the need to use defensive action by having contributed in some way to the generation of the situation. According to Leverick:

*‘the majority of reported self-defence cases are self-generated. Cases of ‘pure self-defence’ - where the accused uses defensive force to repel a sudden and unexpected attack for which she is in no way to blame - are rare. Far more common are cases in which the accused played some part ... in contributing to the situation that ultimately led to the need to use self-defensive force’.*<sup>777</sup>

Research evidence supports the view that the mere possession of an offensive weapon increases the carrier’s risk of becoming a victim of a violent assault.<sup>778</sup> The fact that a person carries an article in order to use it for self-defensive purposes if a situation of necessity arises, contributes to the harm that ensues. It may be argued that one is partly responsible for the situation one faces, and indeed, to some degree, can even be said to anticipate that such a circumstance will arise. Kleck and Gertz have also noted that often those acting defensively have contributed in some way to the situation, and that *‘the notion that much violence is one-sided and that many victims of violence are*

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<sup>775</sup> For a discussion on the value of the ‘reasonable excuse’ defence to strict liability offences, see A.Reed ‘Court of Appeal: Strict Liability and the Reasonable Excuse Defence: *R v Unah* [2011] EWCA Crim 1837’ (2012) 76(4) *Journal of Criminal Law* 293.

<sup>776</sup> This term is borrowed from Leverick in F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 109.

<sup>777</sup> *ibid.*

<sup>778</sup> A.Silvestri et al. *op cit* fn 564 at 21.

*largely blameless is dismissed as naïve*'.<sup>779</sup> The carrying of a weapon is thus regarded as being too pre-emptive. It can even be considered as evidence of prior intention; of a mental element or indication of preparation and willingness to use a weapon not only defensively, but perhaps also offensively.<sup>780</sup>

Historically, by having a part to play in the attack, the defendant may be unable to rely on the defence of self-defence.<sup>781</sup> It was held in the case of *R v Browne*,<sup>782</sup> by the then Lord Chief Justice of Northern Ireland,<sup>783</sup> that the need for defensive force must not have been created by the defender's conduct in the immediate context of the attack. However, it was later decided in the Scottish case of *Burns*,<sup>784</sup> followed and confirmed in *R v Rashford*<sup>785</sup> that the defence should not be ruled out altogether merely because of the defender's initial culpability. In the case of *Rashford*,<sup>786</sup> the circumstances were that the defendant had quarrelled with the victim before they got into a fight and he killed him in self-defence. Situations may occur where the defender provokes a response, or causes some harm to the aggressor, and the aggressor reacts with disproportionate force.<sup>787</sup> Although responsible for initially sparking the aggression, the defender may nevertheless lawfully use force against the aggressor, the original victim, in self-defence. The Court of Appeal suggested in *Harvey*<sup>788</sup> that this depends on whether the '*the tables had been turned*'.<sup>789</sup> Whether the defence will be available to one who is partly to blame for the circumstances will naturally depend on the circumstances of each individual case. However, the idea is to prevent the plea in a situation where the defendant has provoked an attack deliberately with the objective of taking revenge on the aggressor, and then claiming self-defence, (unless the response is disproportionate).<sup>790</sup> Having a role to play in the violence that ensues renders the defendant morally blameworthy for his actions. Therefore, an

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<sup>779</sup> G.Kleck & M.Gertz 'Armed Resistance to Crime: the Prevalence and Nature of Self-Defence with a Gun' (1995) 86 *Journal of Criminal Law and Criminology* 150, at 150.

<sup>780</sup> B.Sangero *Self-Defence in Criminal Law*, *op cit* fn 73 at 318/319.

<sup>781</sup> F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 112.

<sup>782</sup> *R v Browne* [1973] NI 96 at 107.

<sup>783</sup> R.Card *op cit* fn 489 at 711.

<sup>784</sup> *Burns v HM Advocate* 1995 JC 154, 1995 SLT 1090 at 1093H.

<sup>785</sup> *R v Rashford* [2006] Crim LR 547, CA.

<sup>786</sup> *ibid.*

<sup>787</sup> Another example of this situation arose in the cases of *R v Keane*; *R v McGrath op cit* fn 249.

<sup>788</sup> *R v Harvey* [2009] EWCA Crim 469.

<sup>789</sup> *ibid.*, per Moses LJ at 18.

<sup>790</sup> V.Higgins & D.C.Ormerod 'Case Comment: *R v Rashford*, Self-defence: Elements of Defence – Defendant Acting as Initial Aggressor' (2006) *Criminal Law Review* 546, at 547-548.

individual forearmed with a weapon for protection, in case there is a need to act in self-defence, may be acting immorally and illegally, and may be unable to claim self-defence.

Lanham has described the connection between self-defence and offensive weapons as “*an uneasy synergy*”.<sup>791</sup> This tension is certainly evident. The uneasiness arises from the complex position surrounding the carrying of a weapon out of fear or for protection, to enable its use in self-defence if required. There is uncertainty regarding when self-defence may provide a defence, and when it will be restricted. Additionally, there is a need for clarity on the interplay between the defence of self-defence, and the statutory defences of good reason and reasonable excuse. The law allows the use of weapons if it is reasonable and necessary for self-defence. However, the act of possession is only reasonable from the moment it is required to be used in self-defence, and no earlier. Therefore, while the use of a weapon must be reasonable according to the circumstances, the mere act of possessing a weapon does not negate one’s ability to claim self-defence entirely.<sup>792</sup>

The carrying of weapons in public may be considered as dangerous, threatening, and anti-social behaviour that increases the risks of violence and serious harm within communities. The line is difficult to draw between what may be done in lawful self-defence and what exceeds the scope of the defence. Although self-defence is theoretically a possible defence to weapons possession offences, it has scarcely been reflected in practice in the decisions of the courts, and it appears that it does not provide a defence in this context. While the general application of self-defence is satisfactory, it is not within the context of offensive weapons. It is therefore necessary to consider potential solutions and clarifications to the complex legal position, as well as initiatives to prevent the prevalence of weapons possession.

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<sup>791</sup> D.Lanham, *op cit* fn 710at 85.

<sup>792</sup> B.Sangero *Self-Defence in Criminal Law*, *op cit* fn 73 at 318-319.

### **3.6 Legal and non-legal proposals**

#### **3.6.1 The legal proposal**

To offer a suggestion as to how things could be somewhat clarified here, the differentiation between the varying categories of offensive weapons needs to be highlighted. As has been shown, there is a distinct difference between an article made or adapted for use to cause injury, and one intended to cause injury. The former category refers to articles that are offensive *per se*, namely they were designed to be tools for inflicting injuries, to be weapons. The second category also contains a strong indication towards inflicting injury, as there is intent to use the item as a weapon, and positive steps have been taken to facilitate such use. However, the final category relies only on the intention of the carrier. Therefore, within this category are innocent or non-offensive items, which are either carried with a formed intention to use as weapons, or possibly, include the intention to use them defensively if faced by an unlawful attack. The final example is fundamentally different to the previous two categories, as this is essentially a defensive, innocent intention.

This could be an opportunity to achieve clarity, as the former categories should surely be treated differently to a genuine case of an article being carried with the intention for defensive, not offensive, use. While carrying an innocent article with the intent to use it offensively can lead to it being an offensive weapon, on the contrary, an intention to use it defensively perhaps should not. This could provide some clarity in the law, but there is a further challenge to overcome here, and that is the problem of proving the lawful defensive intention. Questions of intention are always difficult as they are substantially subjective, and this would be open to abuse as anyone could easily argue the defensive use ground.

Despite the additional dilemma here, it must be emphasised that this would only apply in relation to ordinarily innocent articles. Items such as umbrellas and walking sticks that the individual has considered could be utilised for defensive purposes if required. These items are not usually prohibited, there is no reason for them to be, and if the law accepts the concept of a weapon of opportunity, then surely self-defence can encompass such items. These would likely be permitted under the ‘reasonable excuse’

defence, as there are no restrictions on carrying such items from day-to-day in public. They should not therefore gain the title of offensive weapons if carried with the possible intention of using them defensively against unlawful attacks.<sup>793</sup>

On the other hand, it is quite clear that weapons that are offensive *per se*, and articles adapted to cause injury pose more significant threats to public safety, and should be subject to the legislative restrictions.<sup>794</sup> The most significant factor here is the fundamentally opposite concepts of offensive and defensive. While the former should be considered always unlawful, the latter can be lawful. Accordingly, possessing innocent objects, albeit with an intention for use to cause injury (defensively), should be within the remit of self-defence; while possessing weapons that are offensive *per se* will give rise to a charge of possessing an offensive weapon, and therefore not be encompassed by the defence.

It is challenging to present a solution that could improve the law in relation to self-defence and offensive weapons. Attempts to improve the law and social interaction regarding self-defence and offensive weapons require a combination of different approaches. Criminological considerations of changing behaviour, environments<sup>795</sup> and social structures<sup>796</sup> should be consulted in conjunction with legal methods, to ensure that the law is effective in terms of its provisions and implementation. Therefore, it is futile to address the criminal activity without also exploring and redressing the underlying reasons and causes that produce the incidents.<sup>797</sup>

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<sup>793</sup> The risk involved with such an approach is that they may be used deceptively by some individuals if the exemption of such articles were widely known. Nevertheless, these items are not weapons, let alone dangerous weapons, and have a limited scope for the causing of harm. Therefore, any such risk is likely to be minimal.

<sup>794</sup> Such as the sword-stick carried in the case of *R v Butler op cit* fn 736.

<sup>795</sup> An informative guide to environmental criminology and Crime Prevention through Environmental Design (CPTED) is provided on the website of The Design Centre for CPTED Vancouver, <<http://www.designcentreforcpted.org/>> (accessed on 17/05/12). This will be discussed in Chapter 5.

<sup>796</sup> For an interesting account of how structural design relates to the defensibility of space, see this article D.Reynald & H.Elffers 'The Future of Newman's Defensible Space Theory' (2009) 6(1) *European Journal of Criminology* 25.

<sup>797</sup> The Government Reply to the Seventh Report from the Home Affairs Committee Session 2008-09 HC 112, *Knife Crime*, (2009), at 7.

### **3.6.2 The non-legal proposal**

One causal factor for possession offences is the easy accessibility to knives that can inflict serious and lethal injuries. Consequently, the medical profession has advanced a more practical, tangible suggestion for change. It has been argued that the design of the kitchen knife should be modified to produce a safer tool. Support has been shown for a complete redesign, although it is acknowledged that this would be a gradual approach, and people may require incentives to encourage replacing the ones currently used in their homes and businesses.<sup>798</sup> The reason for this is that '*a dagger type knife ... can penetrate deeply. Once resistance from clothing and skin is overcome, little extra force is required to injure vital organs*'.<sup>799</sup> An editorial in the *British Medical Journal* found that a survey of chefs did not conclude that a long pointed knife was essential for food preparation. Similarly, manufacturers noted that the design was traditional and not a functional requirement for the effective use of the item. Thus it was concluded that there is no fundamental reason why such designs could not be changed to a safer shape, and it was recommended that '*banning the sale of long pointed kitchen knives is a sensible and practical measure*',<sup>800</sup> that could contribute to a reduction of knife crime.

This is a relatively simple solution, however Bernard states that '*it is human willingness to injure and kill that is the all-important characteristic that needs to be addressed, rather than the presence of any particular device*'.<sup>801</sup> Therefore in reality this might have little to no impact, as people who wish to carry weapons will always find a way to access weapons, or simply alter their choice of weapon.

## **3.7 Initiatives directed at preventing and restricting the carrying of offensive weapons**

The core problems and trends in respect of these offences were identified at the beginning of this chapter, and it is notable that there are many initiatives in operation

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<sup>798</sup> *ibid.*, at 10.

<sup>799</sup> E.Hern W.Glazebrook & M.Beckett 'Editorial: Reducing Knife Crime: We Need to Ban the Sale of Pointed Kitchen Knives', *op cit* fn 606 at 1221.

<sup>800</sup> *ibid.*, at 1222.

<sup>801</sup> D.Bernard 'The Development of the British Faith in Strict Gun Control' (2009) 21 *Journal on Firearms & Public Policy* 1, at 5.

to prevent such crimes. The law alone is an insufficient method to deter the carrying of offensive weapons and bladed articles, as essentially it is only engaged retrospectively: enabling the punishment once the offence has been committed. It is therefore necessary to consider some of the programmes that have been developed in an attempt to tackle this issue on a preventative, societal level.

The Home Office has implemented a number of strategies to tackle crimes involving knives over the past few years, including its Tackling Knives Action Programme (TKAP)<sup>802</sup> and Youth Crime Action Plan,<sup>803</sup> to send out the message that people who carry knives are now more likely to get caught, be prosecuted and receive tough punishment.<sup>804</sup> The Home Office's 2008-2011 plans were to reduce crime and protect the public, addressing the problem by working in partnerships<sup>805</sup> with agencies and using visible policing.<sup>806</sup> The idea of visible policing is to provide a sense of security to people, who are more likely to trust the police if they believe that they are active in their local communities and are quick to respond to criminal activity in the area. This in turn could decrease the perception that individual's need to be armed with a weapon for use in self-defence, by producing a sense of security within the community.

The 'stop and search' powers of the police<sup>807</sup> are located in section 60 of the Criminal Justice and Immigration Act 1994,<sup>808</sup> which provides the right to search individuals where there is good reason to believe that '*there is the possibility of serious violence; or that a person is carrying a dangerous object or offensive weapon; or that an incident involving serious violence has taken place and a dangerous instrument or offensive weapon used in the incident is being carried in the locality*'.<sup>809</sup> As

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<sup>802</sup> Home Office, *Tackling Youth Knife Crime, Practical Advice for Police*, (2009), at 5-6.

<sup>803</sup> See generally, Home Office, *Youth Crime Action Plan*, (2008).

<sup>804</sup> The Government Reply to the Seventh Report from the Home Affairs Committee Session 2008-09 HC 112, *Knife Crime*, (2009), at 11. It is reported here that '*the British Transport Police claimed that their stop and search operation, SHIELD, has contributed to a 39% reduction in the number of crimes where knives are involved since its introduction in 2006*'.

<sup>805</sup> D.Sethi et al (eds), *op cit* fn 495 at vi.

<sup>806</sup> Home Office, *Cutting Crime - A New Partnership 2008-2011*, (2007).

<sup>807</sup> National Policing Improvement Agency, *National Public Order Legislation Guide*, (2011), at 19-20.

<sup>808</sup> Section 60 (1) (b) of the Criminal Justice and Immigration Act 1994 provides the authority to conduct a search where it is believed '*that persons are carrying dangerous instruments or offensive weapons in any locality in his police area without good reason*'.

<sup>809</sup> Metropolitan Police: Total Policing, 'Stop and Search', [http://www.met.police.uk/stopandsearch/what\\_is.htm](http://www.met.police.uk/stopandsearch/what_is.htm) (accessed on 19/07/12).

previously mentioned, the detection of possession offences is a challenge, and these powers are important in this context. Unless the article is used, without the ability to conduct searches, many more of these offences would simply occur unnoticed without any punishment being imposed.

It is worth noting observations by Hitchcock about the success of the TKAP, which did in fact reduce knife crime, (possession and use), in the areas targeted. '*In its first year the programme saw a 17% reduction in Police reported wounding and a massive 32% reduction in hospital admission of serious wounding*'.<sup>810</sup> The continuation of this success is only possible through sustained focus and support in these targeted areas. The fact that reductions have been seen does not mean that the issue has been solved. Should attention be diverted away from these activities, it is possible that they could resurface. The cycle of fear that influences the belief that weapons are vital tools for effective self-defence could easily restart again.

This is a continuing risk as the carrying of knives and other weapons can be considered a form of anti-social behaviour, which is a multidimensional and wide ranging issue that can have devastating effects on communities and society as a whole. Although sometimes considered less serious than some other forms of criminal behaviour, it is a serious matter.<sup>811</sup> Those who experience anti-social behaviour and live in fear of it are a testament to its potentially debilitating harms to personal safety, social activities and community spirit. As already stated, the knowledge that others in the local area are engaging in such activities has an impact on those who fear their behaviour, thus increasing the number of weapons carried as a matter of self-defence and security.

Anti-social behaviour has been normalised and thus we accept too easily things that are and should be unacceptable, such as avoiding specific areas at night or taking different routes in order to avoid confrontation.<sup>812</sup> There exists a need to challenge

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<sup>810</sup> A.Hitchcock 'Opinion: Tackling Teenage Knife Crime' (2009) 4(2) *Policing* 149, at 151.

<sup>811</sup> Westminster Legal Policy Forum, Tackling Anti-social Behaviour and Creating Active Communities, (26 Jan 2011).

<sup>812</sup> *ibid.*



this submissive behaviour,<sup>813</sup> to make our streets safer for everyone, to make public places ‘public friendly’ and accessible. In order to achieve such an aim, work needs to be targeted at community level, to change the views that individuals require weapons to stay safe in public spaces. There are many organisations; charities and youth clubs dedicated to making a difference in this context, working with young people to enhance their potential and future opportunities, so that they have an incentive to choose different paths in their lives.

There are several success stories and evidence of responses that combat anti-social behaviour. A report by the Home Office<sup>814</sup> noted that there is a need for greater cooperation with schools so that more young people are educated about the dangers of carrying weapons. It reported findings from many visits to various schemes and projects across several cities experiencing trouble with young people and weapons, such as London, Birmingham and Manchester, and highlighted the key factors indicative of success. Among these was an interactive organisation called *Fear & Fashion*, run by *Leap* in Westminster, which use games and workshops to challenge pre-conceived opinions.<sup>815</sup> They worked with young people to target the issues of fear and fashion as motivations for carrying weapons, namely, fearing harm from others, and the belief that such behaviour provides status. A vital component of the effective running of the programme is the input from individuals who have either been victims themselves or previous offenders, who had real experience of the damage that can be caused by weapons. Young people listened to their advice and stories as they could relate to them.<sup>816</sup>

Other examples reviewed by the study were targeted towards improving relationships between young people and the police, which can be tense and full of resentment, with young people feeling particularly disrespected and victimised during stop searches. One project aimed to deliver fairer policing, by training the constabulary to conduct

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<sup>813</sup> Examples of modified behaviour are discussed in section 5.2.1, Chapter 5, in relation to Gardner’s research on females in particular. See generally C.B.Gardner ‘Safe Conduct: Women, Crime, and Self in Public Places’ (1990) 37(3) *Social Problems* 311.

<sup>814</sup> B.Kinsella *Tackling Knife Crime Together - A Review of Local Anti-Knife Crime Projects - Executive Summary*, (Home Office, 2011), <<http://www.homeoffice.gov.uk/publications/crime/tackling-knife-crime-together/kinsella-executive-summary?view=Binary>> (accessed on 21/03/12), at 1-3.

<sup>815</sup> *ibid* at 1.

<sup>816</sup> *ibid*.

searches in a less threatening manner, so that they gain the trust of local residents, while another enlisted the experience of police officers to run workshops and presentations debating actions and their consequences, with the aim of deterring those present from carrying weapons in the future.<sup>817</sup>

The key is to address the root of the problem and understand the reasons behind the behaviour and attitudes towards carrying offensive weapons. As Grimshaw notes, *'knife carrying and knife use is merely one expression of interpersonal violence, and a reduction in the use of knives will only occur if the incidence of violence is addressed by a long-term strategy. The knife is merely an implement used in crime'*.<sup>818</sup> This statement demonstrates that the carrying of weapons is merely a symptom of underlying causes. Reaching the source of knife carrying requires the most problematic regions and the individuals most at risk to be identified and addressed. This involves education, changing views and prospects, and increasing the opportunities available. Part of this education should involve an explanation of the legal position with regard to offensive weapons.<sup>819</sup> This should highlight the limitations on claiming fear as a reason for possession, as self-defence appears only available when the weapon has been used, and there is uncertainty whether fear is sufficient for the defences of 'reasonable excuse' and 'good reason'.

Enhancing opportunities and education provide examples of preventative measures that can be taken as opposed to reactive measures, ultimately leading to more positive results. It is promising to note the success of many community centres across the country, but also troubling to note the risks of closure as a result of the government's spending cuts.<sup>820</sup> It is a sobering fact of life that financial resources are finite and as a result some undesirable consequences become inevitable reality.<sup>821</sup> However, this

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<sup>817</sup> *ibid.*

<sup>818</sup> R.Grimshaw 'The Sharp End of Politics?' (2008) 72(1) *Criminal Justice Matters* 44, at 45.

<sup>819</sup> See the following examples of websites offering advice and explanations on the legal position relating to offensive weapons and self-defence: Hertfordshire Constabulary, 'Offensive Weapons', <[https://www.herts.police.uk/advice/young\\_people/advice\\_and\\_information/offensive\\_weapons.aspx](https://www.herts.police.uk/advice/young_people/advice_and_information/offensive_weapons.aspx)> (accessed on 22/07/15); Protecting Yourself, 'How to Defend Yourself and Your Property', <<http://www.protectingyourself.co.uk/>> (accessed on 20/01/11); The Site, 'Weapons and the Law', <<http://www.thesite.org/crime-and-safety/in-trouble/weapons-and-the-law-9301.html>> (accessed on 05/06/11); and E.Baskind 'Law Relating to Self Defence', *op cit* fn 452.

<sup>820</sup> S.Antrobus (chairman), *Breakthrough Britain: Dying to Belong*, *op cit* fn 558 at 112-114.

<sup>821</sup> F.Abrams 'Funding Cuts Threaten Schools' Knife Crime Programmes', (*The Guardian*, 4 May 2010), <<http://www.theguardian.com/education/2010/may/04/schools-funding-knife-crime>> (accessed

does not justify moving backwards and losing services that have not only successfully reduced crime and anti-social behaviour, but have also had a positive impact on the lives of disadvantaged people. It is essential that such initiatives be designed in a manner that is sustainable for the future, to enable the issue of weapons possession to be addressed at every level.

It seems that the target should not be to eradicate knives from the streets in their entirety, as this would be an impossible task. Despite amnesties and the police's stop and search powers, knives will continue to have a presence in public, due to their accessible nature.<sup>822</sup> These methods only provide short-term solutions - they are not effective on their own in the long-term.<sup>823</sup> While 'tough on crime' approaches appear attractive to politicians, to demonstrate proactive measures are being taken, there is a need to address the issues at the heart of knife crime. It must be acknowledged that arbitrary zero tolerance policies can in fact have counterproductive consequences.<sup>824</sup> It is problematic that young people in particular feel that they have become targets, with some subjected to searches on a regular basis. This can harbour feelings of resentment and anger in response to the sense of disrespect projected.<sup>825</sup> Indeed, there is evidence to confirm this assertion, and Newburn has discussed this within the context of his research on the English riots in 2011.<sup>826</sup> He led a team of researchers from *The Guardian* and the London School of Economics that conducted a series of interviews immediately after the riots to gain a detailed understanding of the reasons behind the outbursts across English cities. The research project found that anger towards the police, and the strong sense of injustice deriving from 'stop and search' practices were causal factors in the riots.<sup>827</sup> This confirms the need to target the root

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on 07/06/10); F.Abrams & J.Shepherd 'Knife Crime: Youth Projects in England Hit by Funding Cutback', (*The Guardian*, 3 May 2010), <<http://www.theguardian.com/uk/2010/may/03/knife-crime-youth-projects-funding>> (accessed on 07/06/10).

<sup>822</sup> C.Eades et al. 'Knife Crime' A Review of Evidence and Policy, *op cit* fn 495 at 27/28.

<sup>823</sup> D.E.Stephen 'Time to Stop Twisting the Knife: a Critical Commentary on the Rights and Wrongs of Criminal Justice Responses to Problem Youth in the UK', *op cit* fn 554 at 198.

<sup>824</sup> A.Silvestri 'Young People, 'Knife' and 'Gun Crime': Policy in an Evidence Vacuum?' (2009) 76(1) *Criminal Justice Matters* 48, at 49.

<sup>825</sup> P.Lewis et al. 'Reading the Riots, Investigating England's Summer of Disorder: Rioters say Anger with Police Fuelled Summer Unrest', (*The Guardian*, 5 December 2011), <<http://www.guardian.co.uk/uk/2011/dec/05/anger-police-fuelled-riots-study>> (accessed on 06/05/12).

<sup>826</sup> T.Newburn 'The 2011 England Riots in Recent Comparative Context', (Aberystwyth University Public Lecture, Aberystwyth, May 2015).

<sup>827</sup> P.Lewis et al. *op cit* 825.

causes of the issue of weapons possession, as opposed to merely touching the surface and creating ripples in the water with ‘tough on crime’ approaches.<sup>828</sup>

People who live in dangerous surroundings and feel under threat in their day-to-day lives will not be deterred from carrying weapons for protection without some incentive.<sup>829</sup> There must be a sense of improvement in their living conditions and the quality of their lives before behaviour and trends will change. Namely, there needs to be a realistic alternative available through increased opportunities for education, future careers, and social life. The law alone cannot address this dilemma; fundamental societal changes are also required. In times of austerity this is a significant challenge, as the achievements made by various organisations are lost when funding cuts means that the provision becomes unsustainable. These services are essential to the young people themselves, to their communities, and to society more broadly. The dedication of the staff and volunteers who are broadening perspectives, offering training and support, play a key role in addressing the void that the law cannot reach.<sup>830</sup>

### **3.8 Conclusion**

The interplay between self-defence and offensive weapons offences is far from clear. There is much uncertainty and unpredictability in the legal position. There is also a contradiction in the tendency to punish the lesser act of possession more severely than the graver act of using the weapon to inflict injury. In other words, the conflict emerges in prohibiting the act of carrying, (until the moment its assistance is required), yet justifying the use of the article if it is reasonable in self-defence.

There is certainly an inconsistency in sentencing practice and the allocation of punishment according to the level of harm caused. While some would argue that this

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<sup>828</sup> An example is the situation in East Glasgow. A locally run charity, Fare, has worked within the community in Easterhouse to reduce gang violence. Although the initiative has been successful, the main challenge facing the area now is extreme poverty. B.Holman ‘Gangs and Poverty in East Glasgow’, (*The Morning Star*, 25 Feb 2014).

<sup>829</sup> A.Ashworth ‘Conceptions of Overcriminalization’, *op cit* fn 613 at 415-416; M.Bagaric ‘Rich Offender, Poor Offender: why it (Sometimes) Matters in Sentencing’, *op cit* fn 301 at 1, and 10-12.

<sup>830</sup> B.Kinsella *Tackling Knife Crime Together - A Review of Local Anti-Knife Crime Projects*, *op cit* fn 553 at 30.

is unfair, the stronger argument is that the law cannot allow people to carry weapons just in case they might need them, because this escalates and increases the potential dangers to everyone. The dangers posed by offensive weapons to the public eclipse the ever-present element of chance that an individual will need to use force in self-defence.

Although the law protects each individual, there is no right to arm oneself in case of future attack, as that creates a danger that would not otherwise exist to society. Again this is a matter of balancing the competing interests involved, and reducing harms to society is prioritised over securing self-defence for individuals against unidentified future attacks or threats. Permitting preparatory weapons would be risky, especially as studies have found that carrying weapons increases the carrier's risk of falling victim to violence.<sup>831</sup> This statement does not contravene the human rights of the individual, as human rights are not unlimited, and where a threat is posed to society, they can lawfully be restricted. While an individual would not be restricted from using a weapon for self-defence against an imminent attack or threat of attack, there is no basis for finding a right to forearmament generally. Therefore, one is not entitled to carry a weapon at all times in case one becomes the victim of an attack.<sup>832</sup>

Some may consider this a harsh approach, and it is not without its critics.<sup>833</sup> The thought of individuals unable to protect themselves without the assistance of a weapon is an emotive and provocative dilemma. There is a need for enhanced clarity in this area of the law and wider education for the public to ensure greater understanding of the protection afforded under the law.<sup>834</sup> There is uncertainty regarding what actions may be taken in anticipation of an attack, and whether preparatory weapons can ever fall under the scope of the defence prior to being used for protection. The law's position in relation to possessing offensive weapons and self-defence is confusing, contradictory and unsatisfactory.

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<sup>831</sup> A.Silvestri et al. *op cit* fn 564 at 21.

<sup>832</sup> As held in the case of *R v Taikato* *op cit* fn 619. See previous discussion on this case on page 124. See also J.C.Smith, *Justification and Excuse in the Criminal Law*, *op cit* fn 621 at 48-49.

<sup>833</sup> T.Hsiao 'Bearing Arms in Self-defense: a Natural Law Perspective', *op cit* fn 344 at 119. His opinion was discussed on page 148 of the present chapter.

<sup>834</sup> F.Llewelyn, *op cit* fn 494 at 22.

What has emerged during the course of this discussion is that the only defences to possession offences are ‘good reason’, or ‘reasonable excuse’. Self-defence does not provide a defence to possession offences. While fear alone is not usually sufficient to establish a defence of good reason or reasonable excuse, the case of *Clancy*<sup>835</sup> has provided an authority that suggests fear of attack coupled with an imminent threat could be enough.<sup>836</sup> While this case clarified that fear is a significant consideration in excusing an individual’s decision to carry a weapon, it does not go far enough to refine the legal position. Confusion remains as the terms ‘good reason’ and ‘reasonable excuse’ have been compared to self-defence on occasion, when the latter is only relevant to a charge resulting from the use of the weapon. A further authority removing the confusion from this area is required to appropriately separate and delineate the ambit of these different defences.

Due to the justificatory nature of self-defence, it must be applied within controlled limits. Add to this the clear deterrent objective of the offensive weapons legislation, and it seems this is the most appropriate way for the law to operate. If the position in relation to self-defence were to be more liberal, it could send misleading messages on the level of harm acceptable within society. As there is no legal concept of a defensive weapon, it is an inherently offensive action to carry a weapon,<sup>837</sup> therefore, excusing the act of carrying for fear or protection alone could trivialise a serious offence.

Although there is an undeniable contradiction between allowing a person to use a weapon if it is necessary for protection, yet penalising the possession of the weapon until the moment its use becomes necessary, there is simply no need for the carrying of such articles to be made lawful. Despite the criticism this attracts,<sup>838</sup> there is a firm belief that permitting the carrying of dangerous articles will only lead to negative results. While their presence in public places presents a threat, the law has a limited influence. The ‘tough on crime’ approach of the legislation has constraining effects.

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<sup>835</sup> *R v Clancy* *op cit* fn 687.

<sup>836</sup> See page 136 for further discussion on this matter.

<sup>837</sup> *Evans v Hughes*, *op cit* fn 617; D.J.Baker, *op cit* fn 466, at 696.

<sup>838</sup> For example, see D.Bernard, *op cit* fn 801.

An example would be the Violent Crime Reduction Act 2006<sup>839</sup>, which increased the maximum sentence for possession from two years to four years imprisonment. The problem with assessing the effectiveness of such ventures is that possession offences are notoriously challenging to detect. Many of these offences can occur without ever being noticed, and thus the effectiveness of legislation tackling sentencing is doubtful and hard to determine. As Husak states, '*In reality, the criminal law proscribes, but does not always prevent. We can safely predict that some people will engage in the prohibited behaviour, whatever the law may say*'.<sup>840</sup> If it could be shown that the legislation instilled a clear sense of fear of detection amongst weapons carriers, the impact of the provision could be considered high. However, due to the nature of weapons possession as being often discrete and hidden, many offences occur without detection, and thus the impact of the legislation may only be minor.

Generally, the fact that a person carries an innocent object, or carries an article merely for defensive purposes, does not make the article anything less than an 'offensive weapon', as the person may still intend to use the article to cause injury to the person if faced with an attack.<sup>841</sup> When an article is offensive *per se*, there is no need to show any intention to cause injury with it in order for it to be an 'offensive weapon' because of the inherent dangerousness of the article.<sup>842</sup>

In addition to explicit guidance on the issue of whether or not self-defence can provide a defence to offences of weapons possession, it is necessary to question the position of the law regarding the location of the defence and whether or not location should bear any impact upon the defence. As has been demonstrated in this chapter, location is of direct relevance to offensive weapons as it is an express requirement of the offence of possession that the article be carried in a public place. This means that a person acting in self-defence in a public place has less means available to assist their defence than a person in a private place would have, due to the restrictions on the articles that may be carried. Similarly, location certainly affects self-defence in respect of the test applied in householder cases, as enhanced protection is afforded in

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<sup>839</sup> Violent Crime Reduction Act 2006, section 42.

<sup>840</sup> D.Husak 'Criminal Law Theory', *op cit* fn 582 at 117.

<sup>841</sup> R.Manning *Justifiable Force: The Practical Guide to the Law of Self Defence*, (Barry Rose Law Publishers Ltd, Chichester, 2005), at 77.

<sup>842</sup> *Davis v Alexander* [1970] 54 Cr App R 398.

this context. This is a controversial matter that requires clarification, and will be discussed in the following chapter.



## **Chapter 4: Self-defence – The ‘Householder’ Position**

### **4. Introduction**

The question of the location at which an incident occurs, be it in a private place or a public place, not only generates varying views of the circumstances, but is also capable of leading to entirely different legal outcomes. This chapter explores the subject of location, by questioning how and why self-defence in a public place is viewed and treated differently to self-defence in the home, to attempt to identify and penetrate the fundamental distinction in this context. It is submitted that greater protection is provided to homeowners defending within their own homes than is afforded to those acting in self-defence in public places. This is a direct result of new legislation,<sup>843</sup> but may also have been indirectly evident prior to the legislative amendment.<sup>844</sup> The chapter questions why individuals defending themselves in their own homes are more likely to be able to plead the defence than those who are attacked in public places. It will be disputed whether the law should operate in this manner, or whether it is arbitrary and unfair to draw distinctions based on location.

The general position of the law was explored in Chapter 2, and it is necessary in this chapter to explain the householder position. There have been suggestions for many years that the law in this context requires reform,<sup>845</sup> to increase the protection offered by self-defence. For example, the Criminal Justice (Justifiable Conduct) Bill 2004 failed to introduce the permission for householders to use any necessary force against trespassers; and similarly, the Criminal Law (Amendment) (Householder Protection) Bill 2004, which would have only punished householders where they use grossly

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<sup>843</sup> Section 43 of the Crime and Courts Act 2013 – this will be analysed later in the present chapter.

<sup>844</sup> It is suggested that even prior to legislative changes, the law could be seen to be more favourable to those acting in self-defence within their own homes, than to those defending anywhere else, as what is deemed reasonable in the circumstances would differ considerably. For example, possessing a weapon in a public place is unlawful, however, the same cannot be said of articles that may be used as weapons within the home.

<sup>845</sup> The calls for reform will be explored under the section on ‘tracing the road to reform’. The expansion of the law to householders has also been the subject of attention in other jurisdictions. See for example Yeo on the Canadian position, proposing an extension of the law: S.Yeo ‘Killing a Home Invader’ (2011) 57 *Criminal Law Quarterly* 181, at 191.

disproportionate force, also failed to be enacted.<sup>846</sup> However, the latter has since materialised in the law of England and Wales,<sup>847</sup> as in April 2013 the law was finally amended in relation to householder cases. The most notable change in recent years is the introduction of a new standard based upon the location of the defence, with householders gaining increased legal protection than that afforded in non-householder cases. A critical analysis of the reasons behind the amendment and an examination of sociological perceptions of location will ensue.

The first matter under consideration in this Chapter is the law itself. The reform will be assessed to consider whether or not it was necessary, and whether a substantial benefit will be gained. Secondly, the arguments for and against the amendment will be discussed, in order to gain insight into the debates that preceded the reform, which are also continuing post its enactment. Thirdly, the impact of location in relation to the use of weapons will be analysed, to appreciate whether there is a divergence within the law based on location in this context as well.

#### **4.1 The current position of the law**

As discussed in Chapter 2, the general test for determining self-defence is founded on the use of 'reasonable force'. Therefore, it is usually vital to a successful plea of self-defence that the defensive action is reasonable in the circumstances. To provide a brief overview of what has already been explained, a reasonable response is made up of two elements: necessary force and proportionate force. These requirements exercise a degree of control over the application of the defence. Necessity raises the additional considerations of the possibility of a retreat and the imminence of the threat, while proportionality requires the defensive force used to be proportionate to the offensive force it resists. However, following the enactment of section 43 of the Crime and Courts Act 2013, the test has been amended in the context of householder cases. The test has been widened in this regard to allow the use of disproportionate

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<sup>846</sup> For further discussions on these attempts at legislative amendments, see I.Dobinson & E.Elliott 'A Householder's Right to Kill or Injure an Intruder under the Crime and Courts Act 2013: An Australian Comparison' (2014) 78 *Journal of Criminal Law* 80, at 83-84.

<sup>847</sup> Crime and Courts Act 2013.

force, and anything up to ‘grossly disproportionate’ force.<sup>848</sup> Consequently, the second component of ‘reasonable force’ has been significantly changed.

#### **4.1.1 The application and scope of the new test for self-defence in the home**

It is necessary to consider what exactly the new change to the law entails. Following the enactment of the Crime and Courts Act 2013, there are now two separate tests for self-defence, which vary according to location. The first is a general test of self-defence, the longstanding standard of ‘reasonable force’. The second is a specific standard applying only to householders, the controversial ‘grossly disproportionate force’ test. Thus, outside this context, the general test still remains; it is only in the context of householders that a new test has been introduced.

The amendment to the law is set out in section 43 of the Crime and Courts Act 2013, which amended section 76 of the Criminal Justice and Immigration Act 2008 by the insertion of subsection 5A.<sup>849</sup> The subsection states that *‘in a householder case, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was grossly disproportionate in those circumstances’*.<sup>850</sup> This creates a clearly distinct application of self-defence in householder cases in contrast with other situations of self-defence, widening the standard regarding what is reasonable in the circumstances. In contrast with previous legislation, this is not merely a clarification of the common law, but is a substantive change to the law.<sup>851</sup>

The explanatory notes to the Act explain the provision as such:

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<sup>848</sup> This will be discussed in more detail shortly, but it should be noted here that the new test still expects the force to be ‘reasonable’ in the circumstances, only that the contribution of proportionality to an assessment of reasonableness has been changed.

<sup>849</sup> The full text of section 76 as originally enacted was set out in Chapter 2, pages 36-37. The main provision for reasonable force in self-defence is provided in section 76 of the Criminal Justice and Immigration Act 2008. Section 148 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is not affected, as this simply performed the role of adding omissions into the 2008 Act.

<sup>850</sup> Ministry of Justice, *Use of Force in Self-defence at Place of Residence*, (Circular No. 2013/02, 26 April 2013), at 7.

<sup>851</sup> Current Law Statutes Annotated, c.22 *Crime and Courts Act 2013*, Sweet & Maxwell, Vol 1, 2013, at 123.

*‘Section 43 amends section 76 of the Criminal Justice and Immigration Act 2008 so that the use of disproportionate force can be regarded as reasonable in the circumstances as the accused believed them to be when householders are acting to protect themselves or others from trespassers in their homes. The use of grossly disproportionate force would still not be permitted. The provisions also extend to people who live and work in the same premises and armed forces personnel who may live and work in buildings such as barracks for periods of time. The provisions will not cover other scenarios where the use of force might be required, for example when people are defending themselves from attack on the street, preventing crime or protecting property, but the current law on the use of reasonable force will continue to apply in these situations’.*<sup>852</sup>

This explains the situations in which the householder defence will be available and when the general defence will remain applicable. Among the aims of the Act are listed: the establishment of the National Crime Agency; provisions relating to the judiciary and the administration of courts and tribunals; deferred prosecution agreements; border control; provisions relating to drugs and driving; and ‘for connected purposes’.<sup>853</sup> The Act addresses several varied matters, and this householder provision has been squeezed in under Part Two focusing on courts and justice. The Ministry of Justice notes in its guidance on the legislation that

*‘these changes go further than clarifying existing law; they strengthen the law in relation to householders who are defending themselves from intruders in their homes ... householders who use a disproportionate level of force to protect themselves or others in their homes will not automatically be regarded as having acted unlawfully and treated as criminals’.*<sup>854</sup>

While the test clearly permits far greater force to be used than previously with regard to the circumstances in which the homeowner will be considered to have acted unlawfully, it draws the line at those acts that are considered ‘grossly disproportionate’, which will never be lawful.<sup>855</sup>

However, there is no explanation provided in terms of what is considered ‘disproportionate’ as opposed to ‘grossly disproportionate’, and in practice it might

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<sup>852</sup> Crime and Courts Act 2013, c.22, Explanatory Notes, section 43.

<sup>853</sup> Crime and Courts Act 2013.

<sup>854</sup> Ministry of Justice, *Use of Force in Self-defence at Place of Residence*, *op cit* fn 850 at 4.

<sup>855</sup> Section 43(5A), Crime and Courts Act 2013.

not prove easy to distinguish between these fine lines.<sup>856</sup> The Ministry of Justice states that the measure is designed to provide added protection for frightened homeowners who are acting under difficult circumstances, and that there are ‘*no hard and fast rules about what types of force might be regarded as ‘disproportionate’ and ‘grossly disproportionate’*’.<sup>857</sup> The CPS guidelines explain that the provision does not provide householders with the absolute right to use disproportionate force in every single case, as the amendment must still be read in conjunction with the other requirements set out in section 76 of the Criminal Justice and Immigration Act 2008. This means that the force must, according to section 76(3), still be reasonable in the circumstances as the householder believed them to be at the time.<sup>858</sup>

The new provision creates a specific test within the context of the home and householders. Section 43 (8) is instructive regarding what comes within the definition of a ‘householder case’:

“(8A) For the purposes of this section “a householder case” is a case where—

(a) the defence concerned is the common law defence of self-defence,  
(b) the force concerned is force used by D while in or partly in a building, or part of a building, that is a dwelling or is forces accommodation (or is both),

(c) D is not a trespasser at the time the force is used, and

(d) at that time D believed V to be in, or entering, the building or part as a trespasser.

(8B) Where—

(a) a part of a building is a dwelling where D dwells,

(b) another part of the building is a place of work for D or another person who dwells in the first part, and

(c) that other part is internally accessible from the first part, that other part, and any internal means of access between the two parts, are each treated for the purposes of subsection (8A) as a part of a building that is a dwelling.

(8C) Where—

(a) a part of a building is forces accommodation that is living or sleeping

<sup>856</sup> Wake provides an illustration of the complexities of this amendment: ‘perplexed jurors will be required to engage in mental gymnastics in order to determine whether the defendant’s conduct is to be regarded as reasonable, disproportionate or grossly disproportionate’. N.Wake ‘Battered Women, Startled Householders and Psychological Self-defence: Anglo-Australian Perspectives’ (2013) 77 *Journal of Criminal Law* 433, at 447.

<sup>857</sup> Ministry of Justice, *Use of Force in Self-defence at Place of Residence*, op cit fn 850 at 4.

<sup>858</sup> CPS Guidelines, ‘Self-defence and the Prevention of Crime’, <[http://www.cps.gov.uk/legal/s\\_to\\_u/self\\_defence/](http://www.cps.gov.uk/legal/s_to_u/self_defence/)> (accessed on 24/03/14). See discussion in section 4.2 of the present chapter for the debate when the Act was in its Bill stage.

*accommodation for D,*  
 (b) *another part of the building is a place of work for D or another person for whom the first part is living or sleeping accommodation, and*  
 (c) *that other part is internally accessible from the first part, that other part, and any internal means of access between the two parts, are each treated for the purposes of subsection (8A) as a part of a building that is forces accommodation.*  
 (8D) *Subsections (4) and (5) apply for the purposes of subsection (8A)(d) as they apply for the purposes of subsection (3).*  
 (8E) *The fact that a person derives title from a trespasser, or has the permission of a trespasser, does not prevent the person from being a trespasser for the purposes of subsection (8A).*  
 (8F) *In subsections (8A) to (8C)—*  
*“building” includes a vehicle or vessel, and “forces accommodation” means service living accommodation for the purposes of Part 3 of the Armed Forces Act 2006 by virtue of section 96(1)(a) or (b) of that Act”.*<sup>859</sup>

The section sets a number of conditions on the use of the wider test. There are several points worth noting about the provision.

First, the individual must be using defensive force to protect themselves or others against a trespasser, as stated in subsection 8(A)(a) and 8(A)(d). While the defensive force must be exerted against a trespasser, there is no differentiation between different kinds of trespassers. This means that the section would be applicable to an aggressive intruder as well as an unarmed young intruder.<sup>860</sup> According to the case of *Day*, this could also extend to an initially invited guest who subsequently refuses to leave.<sup>861</sup>

Second, the defender must be acting within a building<sup>862</sup> according to subsection 8(A)(b), or part of a building, that is a dwelling or forces accommodation. It is not sufficient to be acting defensively outside, for example in the garden. This presents an obstacle for struggles that ‘spill over’ outside the structure of the home, or on the threshold of the property.

<sup>859</sup> Section 43 (8) Crime and Courts Act 2013.

<sup>860</sup> I.Dennis ‘Editorial: What should be done about the Law of Self-defence?’ (2000) *Criminal Law Review* 417, at 417. See page 177 for further discussion.

<sup>861</sup> *R v Day* [2015] All ER (D) 108 (Apr).

<sup>862</sup> Forster provides analysis on the meaning of building in this context, stating that the enhanced protection would apply to non-conventional dwellings such as narrow boats and caravans. S.Forster ‘Belief and Reasonable Force: Is there a “Legitimate Purpose”?’ (2014) 178 *Criminal Law & Justice Weekly* 279, at 281.

Third, the defender must not be trespassing at the time of the defence. The defender understandably, must be in the property lawfully to gain the increased householder protection, as provided by subsection 8(A)(c). This applies to all people who are lawfully at the property, for example guests, cleaners, or child minders; not merely the homeowner himself.<sup>863</sup>

Fourth, the section covers places of work when connected to dwellings, and classifies that vehicles can also come under the title of building for the purposes of the Act. This is in accord with the definition of a building for the purposes of burglary under section 9(4) of the Theft Act 1968, which includes inhabited vehicles as buildings that are dwellings.<sup>864</sup> This means that the provision's ambit is much wider in some respects than previously provided by the law, providing increased protection in householder cases.<sup>865</sup>

In its introduction to the guidance issued on the new legislation, the Ministry of Justice provided a statement demonstrating the reasons behind the change. It acknowledges that public perception had a great impact on the change, and that cases involving householders rarely reach the courts:

*'It is rare for householders to be confronted by intruders in their homes and even rarer for them to be arrested, prosecuted and convicted as a result of any force they used to protect themselves. When such cases do occur, the Government believes they can give rise to a public perception that the law is balanced in favour of the intruder. In response to these concerns the Coalition Agreement committed 'to ensure that people have the protection that they need when they defend themselves against intruders'.*<sup>866</sup>

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<sup>863</sup> This was confirmed during the debate on the Bill at the Public Bill Committee – see page 183 for more discussion of this point.

<sup>864</sup> The provision states that '*References in subsections (1) and (2) above to a building, and the reference in subsection (3) above to a building which is a dwelling, shall apply also to an inhabited vehicle or vessel, and shall apply to any such vehicle or vessel at times when the person having a habitation in it is not there as well as at times when he is*'.

<sup>865</sup> Nevertheless, it can be contended that it is fairly narrow in other respects, for example in its requirement for force to be used solely within the home, and thus its reluctance to extend it to the exterior garden of the home. This raises an interesting question of interpretation, whether this is always a fixed rule, or whether it is circumstantial. For example, would an enclosed gated garden be an extension of the home, or is it limited to the doorstep? Further clarification is necessary on this point by way of future statutory interpretation in the courts.

<sup>866</sup> Ministry of Justice, *Use of Force in Self-defence at Place of Residence*, *op cit* fn 850 at 3.

This answers the claims of critics affirmatively, that the change of law was not based on a need to redress an injustice to the public. The statement itself indicates that not only are these specific cases rare, but the number of defendants facing legal proceedings are even rarer. It can therefore be said that the section was enacted as a precautionary measure to satisfy the public perception, and not in response to an evident inequity within the law.<sup>867</sup>

Before the Act of 2013, it was clearly acceptable for householders to use reasonable force against intruders in their own home. The law in this context was clear, as stated in the case of *Palmer*,<sup>868</sup> that providing no more than reasonable force was used, in the circumstances as the homeowner believed them to be at the time, he will not be prosecuted. This is reflected in the decision by the Court of Appeal in *Faraj*,<sup>869</sup> where it was decided that even in situations where the homeowner does not believe that he is under a personal threat himself, and that it is merely his property which is threatened, he may detain the intruder to secure arrest by using force, providing it is not aggressive force. It is clear that people who are attacked in their own home are not under a duty to withdraw.<sup>870</sup> However, where a safe retreat is a possibility, it is preferable for this route to be taken as opposed to using force against the intruder or burglar. This is because property interests should not be prioritised over human life, which is far more valuable and sacred.<sup>871</sup>

Consequently, there is generally a need for an attack or threat to take place against the homeowner before lethal force may be used in self-defence. Merely protecting one's property is insufficient. Leverick has stressed that killing in defence of property is never acceptable as there must be an unjust threat against one's life before it is ever justified to use lethal force in self-defence.<sup>872</sup> Ormerod states that it is only in extremely rare circumstances, if ever, that killing to protect property will be considered reasonable.<sup>873</sup> Although the modification in the 2012 Act to include the

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<sup>867</sup> Both the arguments supporting and opposing the change will be discussed under sections 4.2.1 and 4.2.2 of this chapter.

<sup>868</sup> *R v Palmer*, *op cit* fn 105.

<sup>869</sup> *R v Faraj* [2007] 2 Cr App R 25.

<sup>870</sup> A.Ashworth 'Self-Defence and the Right to Life', *op cit* fn 243 at 294.

<sup>871</sup> F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 131.

<sup>872</sup> *ibid* at 135.

<sup>873</sup> D.Ormerod Smith and Hogan's Criminal Law, *op cit* fn 16 at 395.



defence of property could have the result of allowing the use of reasonable force against threats to property alone, with no need for the defender to fear for his life, killing for this purpose is unlikely to be regarded as reasonable force.<sup>874</sup>

However, with the test now changed to permit disproportionate force, the outcome could be different. The lines between permissible and impermissible action has been blurred due to the legislative amendments. For example, consider a situation where a householder finds an intruder in the kitchen during the evening. The intruder is homeless, has not eaten in days, and intends only to steal food without disturbing anyone in the house.<sup>875</sup> The startled householder is naturally unaware of the intruder's intentions and perceives a threat to his life. In his fear, he grabs a knife and stabs the intruder. If the intruder is killed, it is unlikely that the circumstances as he honestly, but mistakenly believed them to be would meet the reasonable force requirement in the defence. It remains to be seen how the courts will interpret disproportionate force in self-defence when it transpires that only property is threatened under the householder provision. In relation to the example provided above, the crux of the case would rest on whether the reaction is deemed disproportionate, thus permitting a defence, or grossly disproportionate, which would deny the defence.

The legislative amendments have therefore caused confusion. Paul Mendelle QC, former chairman of the Criminal Bar Association, argues that the inclusion of the words 'defence of property' was unnecessary, as the law already permitted the use of force to prevent crime, which would cover situations in the home involving burglars. He states that '*it would rarely be reasonable to kill in defence of property as opposed to defence of the person. Or would this government feel it right to sanction the extra-judicial slaughter of burglars to prevent a crime for which parliament has decided the maximum penalty is 14 years in prison?*'<sup>876</sup> The result of the change to the test in the

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<sup>874</sup> For a discussion on the relevance of the defence to the killing of intruders, see S.Skinner 'Populist Politics and Shooting Burglars: Comparative Comments on the Lega Nord's Proposal to Reform Italian Self-defence Law' (2005) *Criminal Law Review* 275, at 275-276.

<sup>875</sup> A similar example is offered by Dennis, namely, a young apple thief discovered in the householder's kitchen. See I.Dennis 'Editorial: What should be done about the Law of Self-defence?', *op cit* fn 860 at 417.

<sup>876</sup> P.Mendelle 'Self-defence Law Shows how Politicians use Legislation as PR', (*The Guardian*, 31 October 2011).

context of householders may be that the balance has been tipped away from the sanctity of life, towards the protection of property.

Nevertheless, as explained in the Chapter 2, it should be stressed that the general test of self-defence, which requires reasonable force, is a lenient test. It appreciates that while the court will have the benefit of time to consider the element of reasonableness, the defender must act instantaneously without having the time to consider and determine his actions accordingly. Therefore, exact proportionality is not expected nor required.

Despite some claims from the media that the law of self-defence is too limited and should be extended to give people enhanced rights to fight off attacks, particularly for householders,<sup>877</sup> the situation was already adequately covered by the law. This statement is supported by research conducted by Almandras, who refers to the number of prosecutions that take place and notes that they are generally rare, '*between 1990 and 2005 there were only 11 prosecutions of people who had attacked intruders in houses, commercial premises or private land*'.<sup>878</sup> Providing a person does no more than he honestly and instinctively believes is reasonably necessary in the heat of the moment, a prosecution will not take place.

While there have been many cases reported in the media involving homeowners facing legal proceedings, these cases have not resulted in convictions. Indeed, most are not taken to court, they merely go through the initial stages of due process, to discover the nature of the incident, and as soon as it is held that they acted in lawful self-defence, the case is not pursued further. These media representations may be

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<sup>877</sup> As evinced from several public outcries and law reform campaigns, particularly in relation to homeowners and their position under the law. For example, see: P.Hennessy & M.Kite 'Tories Back New Rights to Help Home Owners Protect Themselves from Burglars', (*The Telegraph*, 19 Dec 2009), <<http://www.telegraph.co.uk/news/uknews/law-and-order/6844682/Tori...rights-to-help-home-owners-protect-themselves-from-burglars.html>> (accessed on 19/05/11).

<sup>878</sup> S.Almandras *Use of Force Against Intruders: Do "Have a Go Heroes" Need Greater Protection from Criminal Prosecution?* (Key Issues for the New Parliament 2010, House of Commons Library Research, 2010), <[http://www.parliament.uk/documents/commons/lib/research/key\\_issues/Key-Issues-Use-of-force-against-intruders.pdf](http://www.parliament.uk/documents/commons/lib/research/key_issues/Key-Issues-Use-of-force-against-intruders.pdf)> (accessed on 20/01/11), at 93  
<<http://www.parliament.uk/documents/commons/lib/research/key%20issues/key%20issues%20use%20of%20force%20against%20intruders.pdf>> (accessed on 20/01/11).

responsible for the public perception that the law of self-defence is unfair,<sup>879</sup> but in fact, those that understand the operation of the law, agree that it was already fair and did not require expansion. This will become clearer in the following discussion on law reform.

#### **4.1.2 Tracing the road to law reform**

Over the past few years there have been many attempts to change the law in this area.<sup>880</sup> The Prime Minister, David Cameron said in 2011 “*we will put beyond doubt that homeowners and small shopkeepers who use reasonable force to defend themselves or their properties will not be prosecuted*”.<sup>881</sup> He has taken a strong approach to the matter, providing several noteworthy statements, including ‘*burglars “leave their human rights outside” the moment they break in to someone else’s property*’,<sup>882</sup> and ‘*my mission is to make sure that families can feel safe in their own homes*’.<sup>883</sup> This promise has since been acted upon through the enactment of two pieces of new legislation; the Legal Aid, Sentencing and Punishment of Offenders Act 2012, and the Crime and Courts Act 2013. The 2012 Act is a further attempt to clarify the law, by explaining the meaning of ‘reasonable force in self-defence’;<sup>884</sup> and the latter, by far the most controversial, changes the test of self-defence in householder cases to allow anything up to ‘grossly disproportionate force’.<sup>885</sup>

Section 148 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 amends the provision in section 76 of the Criminal Justice and Immigration Act 2008,

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<sup>879</sup> The classic example reflecting public misunderstanding of the law of self-defence is that of Anthony Martin. This will be discussed at section 4.3.3. S.Morris ‘The Killer Who Won a Nation’s Sympathy’, (*The Guardian*, 30 October 2001), <<http://www.theguardian.com/uk/2001/oct/30/tonymartin.ukcrime2>> (accessed on 20/06/13).

<sup>880</sup> See page 169.

<sup>881</sup> C.Mason ‘Cameron Faces Questions over Home Defence Pledge’, (*BBC News*, 21 June 2011), <<http://www.bbc.co.uk/news/uk-politics-13865987>> (accessed on 05/08/12).

<sup>882</sup> L.Kolirin ‘Cameron: No Human Rights for Burglars’, (*Daily Express*, 1 Feb 2010), <<http://www.express.co.uk/posts/view/155410/Cameron-No-human-rights-for-burglars>> (accessed on 03/07/11).

<sup>883</sup> M.Hall ‘Now You Can Bash a Burglar’, (*Daily Express*, 22 June 2011), <<http://www.express.co.uk/posts/view/254230>> (accessed on 03/07/11).

<sup>884</sup> The first statutory attempt at clarifying the common law defence of self-defence was section 76 of the Criminal Justice and Immigration Act 2008. The 2012 Act amends this adding further detail into the section. See page 36-37 of Chapter 2.

<sup>885</sup> A full analysis of the statutory provision follows the arguments for and against the amendments.

and was explored in Chapter 2.<sup>886</sup> The aim is to ensure that the law regarding self-defence and other related defences is clear, and set out in one place. The purpose of section 148 is to provide greater reassurance to home owners about exercising their rights, by making it clear that a person can use reasonable force to defend property (in addition to defending himself or other people or preventing crime),<sup>887</sup> and that he is under no legal duty to retreat. However, following these clarifications, issues remained. Discussions continued over the reasonable force test to determine actions of self-defence. Politicians, especially within the Conservative party, pushed for this test to be changed to one of grossly disproportionate force. Despite significant opposition, and the mystery of why so much emphasis is placed upon the rights of self-defence for householders,<sup>888</sup> this change was finally put into effect with the passing of the Crime and Courts Act 2013. However, before the Act was passed, the Public Bill Committee displayed a reluctance to offer examples of how the test would operate in practice and to explain its necessity.<sup>889</sup>

#### **4.2 The debate on the Crime and Courts Bill**

The House of Commons Public Bill Committee met on 5, February 2013 to discuss the Crime and Courts Bill. Clause 30 of the Bill included the proposed amendment to the law of self-defence in the context of householder cases. While many objections to the clause were voiced, the most important questions remained unanswered; for example, probing the difference between the interpretation of ‘disproportionate’ and ‘grossly disproportionate’, and how the new test would differ from the general position in practice. Therefore, it was not a wholly satisfactory debate, and indeed, it may be argued, inadequate. This section contains extracts from the transcript of the debate in order to convey the frustrating and incomplete nature of the discussion.

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<sup>886</sup> See page 38 of Chapter 2.

<sup>887</sup> However, as explained on page 176, killing in defence of property alone is unlikely to be considered reasonable.

<sup>888</sup> Michael Wolkind QC, *Sky News: Property Householder Self-Defence Rights*, <<http://www.topcriminalqc.co.uk/property-householder-self-defence-rights-barrister-qc.html>> (accessed on 01/10/12). Wolkind questioned this emphasis on householders, and could not understand why a different test should apply outside and inside the home.

<sup>889</sup> As will become evident through illustrative examples.

Mr Shailesh Vara<sup>890</sup> supported the amendment and considered the clause to be an important change to the law. He had himself attempted to propose the change in a Private Members Bill, although unsuccessfully, in 2006.<sup>891</sup> However, there are several opposing views, for example, Jenny Chapman<sup>892</sup> is critical of the proposed amendment in the Bill. In her challenges, she refers to the opinions of many who work in the legal profession, from the DPP at the time to senior judges, including the former Lord Chief Justice of England and Wales, Lord Judge. These expert, experienced and knowledgeable individuals expressed that the standard of reasonable force works well, and that it allows sufficient protection to homeowners faced by intruders in their homes. Therefore, she probed on several occasions, what difference the amendment would in fact make. She acknowledged the desirability of providing clear protection for victims, but also emphasised that it appears that the law is already succeeding to provide fair protection.<sup>893</sup>

A notable argument was the increased confusion that the amendment would bring to the law. Chapman expressed that:

*‘we are concerned that the Government’s proposed change does not really add protection; it just adds more confusion. The point is that the line between disproportionate and grossly disproportionate is still not clear ... there is wide-ranging consensus out there that the Government’s changes are at best unnecessary, and that they could increase risk and confusion ... we are giving the judges the seemingly impossible job of concluding that a particular act is both reasonable and disproportionate’.*<sup>894</sup>

This raises several important points.<sup>895</sup> There is the issue of legislating confusion into the law, the uncertainty of interpretive definitions, and the lack of evidence of necessity. However, these concerns were not dispelled during the debate.

By way of response to the challenges made by Chapman, Mr Vara replied that the key objective behind the proposal is *‘to avoid an individual going through the misery,*

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<sup>890</sup> North West Cambridgeshire Conservative MP. From here on referred to as ‘Mr Vara’.

<sup>891</sup> Crime and Courts Bill Deb 5 February 2013, cols 270-271.

<sup>892</sup> Darlington Labour MP. From here on referred to as ‘Chapman’.

<sup>893</sup> Crime and Courts Bill Deb, *op cit* fn 891, col 273.

<sup>894</sup> *ibid*, cols 273-274. Quoting Chapman.

<sup>895</sup> The arguments for and against the amendment in section 4.2.1 and 4.2.2 will further explore these issues.

*pain and suffering of getting to the prosecution stage in the first place. If a decision can be taken instantly that the incident is not worth taking to court, the individual can get on with their life, rather than having a year or so of their and their families' lives completely disrupted'.*<sup>896</sup> This goal is understandable, but as will be explained in the arguments against the change, it is not practical. It is undeniable that some degree of procedure must follow the action of self-defence. It is simply inconceivable to state exclusively that in the case of householders the case should not go through the usual processes of the criminal justice system. This would be contrary to the fundamental principles of criminal law, and would impede the role and responsibilities of the CPS.

It is worth highlighting the Code for Crown Prosecutors here, which provides a two stage-test that the CPS must apply before a prosecution will take place.<sup>897</sup> As this test applies to all cases, it is unnecessary to develop a different standard for cases of householder self-defence. The first part of the test is the evidential hurdle. This requires sufficient evidence for a realistic prospect of conviction. If this hurdle is not surmounted, the case will not proceed. The second part of the test is the public interest factor. This requires the prosecution to be in the public's interest, if it is not, then again the case will not proceed.<sup>898</sup>

A clear case of self-defence would fall at the first hurdle, as a defence would be provided to any charge arising from the defensive action. Other cases may be more complex and uncertain, and would perhaps progress to the public interest stage. Here, prosecutors consider several different factors including the seriousness of the offence; the culpability of the suspect; the circumstances and level of harm caused; the impact on the community; and the proportionality of a possible prosecution.<sup>899</sup> Again, there is a filter for lawful actions to ensure that only cases requiring a trial will proceed further. A householder's position in self-defence will rarely require a prosecution,

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<sup>896</sup> Crime and Courts Bill Deb, *op cit* fn 891, col 274. Quoting Mr Vara.

<sup>897</sup> CPS, *Prosecution Policy and Guidance: The Code for Crown Prosecutors*, <[http://www.cps.gov.uk/publications/code\\_for\\_crown\\_prosecutors/codetest.html](http://www.cps.gov.uk/publications/code_for_crown_prosecutors/codetest.html)> (accessed on 19/09/14).

<sup>898</sup> Williams has considered the two stage test within the context of assisted dying cases. She provides examples of where the public interest factor can involve the balancing of competing interests. She demonstrates that sometimes the public interest factors against prosecution can be more compelling than those for prosecution. G.Williams 'Assisting Suicide, the Code for Crown Prosecutors and the DPP's Discretion', *op cit* fn 55 at 186-187.

<sup>899</sup> CPS, *op cit* fn 897.

unless it is beyond the scope of the defence. Thus, the arguments for a different test for prosecutors here is redundant, as a successful standard is already in place across the criminal justice system. The suggestion of creating a different test for the CPS to apply throughout the process in householder cases is concerning. This would form an inconsistent practice and would call into question the standard across the whole criminal justice system. Namely, if this category merits a separate test, then should there be many more variations of the standard to encompass different types of crime? This would create a slippery slope calling for intensive scrutiny of the application of the test across the large body of criminal offences, and is completely unnecessary.

A persuasive opposing argument was raised by Steve McCabe,<sup>900</sup> reaching the root of the problem, that *‘on the wider point, this represents the danger of trying to translate party speeches – maybe necessary for that occasion – into legislation ... We almost seem to be inviting people to use disproportionate force, irrespective of the circumstances’*.<sup>901</sup> This reflects the argument that it was due to political expediency that the clause was introduced, as a way of attracting political votes, and not because there was a true need for a change in the law. It also highlights the unacceptable nature of the desire to avoid any procedure at all for householder cases. This would extract the justice element from the criminal justice system.

Despite the challenges, Damien Green (The Minister for Policing and Criminal Justice)<sup>902</sup> replied in defence of the Bill, that

*‘the provision is first and foremost about householder defence. The home is the one place where a person should have the right to feel safe ... the provision will apply to anybody lawfully in a dwelling who may come face to face with an intruder. That would include the householder and his family, but it would also include friends or visitors – for example, a child minder – who are lawfully in the dwelling when the attack takes place’*.<sup>903</sup>

Thus, he clarifies a potential confusion over the application of the defence, explaining that it encompasses all who are lawfully in the dwelling at the time of the attack, not merely the homeowner. This demonstrates the importance of the trespasser

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<sup>900</sup> Birmingham, Selly Oak Labour MP. From here on referred to as ‘McCabe’.

<sup>901</sup> Crime and Courts Bill Deb, *op cit* fn 891, col 276. Quoting McCabe.

<sup>902</sup> From here on referred to as ‘Green’.

<sup>903</sup> Crime and Courts Bill Deb, *op cit* fn 891, col 277. Quoting Green.

component and centralises the need for a right of entry to be present. It reflects the principle of protecting those who act within the law and punishing those who offend by extending the increased householder defence to anyone lawfully present in the dwelling at the time.

The limits regarding to whom the defence would be available are explained, and whilst it would be of benefit to shop keepers, it would not apply to other people visiting the shop, such as customers. This distinction is based on the difficulty of application:

*‘if we widen the defence beyond householders in their dwellings so that it covers customers visiting a shop, for example, it would be difficult to justify not extending the defence to other scenarios where a person might come under attack such as when they are confronted by a mugger on the street. The current law on the use of reasonable force will continue to apply in those situations ... The provision is designed to focus on householder defence because those cases tend to concern the public the most. Householders want to feel safe in their homes ...’*<sup>904</sup>

This argument and explanation is flawed, as the public are affected and alarmed by attacks necessitating defence in both public and private places. While home intrusions are naturally frightening and can lead people to fear that they will also become a victim of other crimes, attacks occurring in public have potentially wider scope to cause public concern.<sup>905</sup> Attacks occurring in public are more likely to be perpetrated by strangers, and as Kleck explains: *‘Violence among strangers is more frightening because it is perceived as more random and unpredictable, and thus a risk that can affect anyone, not just those with relatives and other associates known to be violent’*.<sup>906</sup> While burglars are also likely to be strangers, the point made here is that most violence occurring within the home is not perpetrated by strangers, but rather by a non-stranger.<sup>907</sup> Placing the emphasis in the new provision on the use of force against a trespasser does not reflect the true nature of the range of threats present

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<sup>904</sup> *ibid*, col 278. Quoting Green.

<sup>905</sup> See section 5.2.1 of Chapter 5 for further discussion on fear of crime.

<sup>906</sup> G.Kleck ‘How Not to Study the Effect of Gun Levels on Violence Rates’ (2009) 21 *Journal on Firearms & Public Policy* 65, at 80.

<sup>907</sup> For a discussion on the different attitudes towards violence committed by strangers and non-strangers, the higher public fear of violence committed by strangers and its prioritisation for punishment, see: C.B.Hessick ‘Violence Between Lovers, Strangers, and Friends’ (2007-2008) 85 *Washington University Law Review* 343, at 344, 348 and 371.



within the home, and suggests a lack of research into both fear and risk of crime prior to the preparation of the Bill.

The range of people who are excluded from enhanced protection exemplifies the problems of this new defence: it introduces far more confusion as different tests apply to different people within the same situation. Why should a customer have a lesser right than the shopkeeper if they are facing the same attack at the same time? Previously both could use reasonable force in the circumstances. Now however, the measure of what is reasonable must be proportionate for one, while the other may act disproportionately providing the action is not 'grossly disproportionate'. It is unclear how different these standards are, and how much more one would be permitted to do than the other. It appears to be an arbitrary distinction lacking a persuasive rationale.

Hypothetical questions were posed in relation to the scope of the amendment,<sup>908</sup> but Green completely avoided the questions and could not provide a single example of how the law would operate.<sup>909</sup> He explained the difference between the previous and the new test as follows: '*The key difference is that disproportionate force will not of itself be deemed unreasonable ... That is the difference; it is an extra protection for householders*'.<sup>910</sup> However, this does not explain the additional protection this would achieve, nor provide an example of the shortcomings of the previous test.

The opposition, along with many academics and legal practitioners,<sup>911</sup> share the position advanced in this thesis that the test of reasonable force was wide enough in its application to safeguard those who acted in lawful self-defence. It is understandable that the public seeks reassurance over their rights to react in instances of home invasions. However, the evidence suggests that most people naturally respond within the limitation of reasonable force. It appears that the safeguards of assessing the circumstances as the defendant perceived them at the time, along with the two-stage test employed by the CPS, ensure a balanced application of the defence with no further need for expansion.

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<sup>908</sup> For example, how it would affect someone acting in self-defence in their garden.

<sup>909</sup> Crime and Courts Bill Deb, *op cit* fn 891, col 278. Quoting McCabe and Green.

<sup>910</sup> *ibid*, col 280. Quoting Green.

<sup>911</sup> Examples are provided on page 181 and in section 4.2.2 of the present chapter.

Green emphasised the reasons behind the proposal, stating that ‘*there is genuine public concern about people who are fundamentally victims of crime being criminalised themselves. That is at the root of the changes*’.<sup>912</sup> Although this view is understandable, this risk is mitigated by the adaptability of the standards applied in self-defence to individual cases. The reasonable force test is an appropriate standard, as it takes the householder’s view of the situation into consideration, and does not bar the defence when an individual is mistaken in relation to the need for defensive force.<sup>913</sup> Therefore, instances of innocent people being punished should not occur. The new standard has created confusion by splitting the law of self-defence into two different tests.<sup>914</sup>

The conclusion of the debate at the House of Commons Public Bill Committee, despite the persistent questioning and lack of adequate answers or logical reasoning, was disappointing. Clause 30 was accordingly ordered, and was to stand as part of the Bill. There are several matters that have not been addressed, such as the practical difference between ‘disproportionate’ and ‘grossly disproportionate’ force, which must unfortunately now await interpretation by the courts when relevant cases come to trial.

Despite the lack of answers from the Public Bill Committee, the discussions highlighted a number of competing views on the householder test. Indeed, the debate alluded to some of the key arguments supporting and opposing the change. The arguments in favour of this amendment will first be explored, followed by the arguments against. It is submitted here that the change was unnecessary and undesirable, and as stated by Liberty, that it ‘*sets a dangerously low threshold for what will be considered acceptable violence used in the context of self-defence in the home*’.<sup>915</sup>

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<sup>912</sup> Crime and Courts Bill Deb, *op cit* fn 891, col 284. Quoting Green.

<sup>913</sup> See section 2.1.1(b)(i) in Chapter 2.

<sup>914</sup> I.Dobinson & E.Elliott, *op cit* fn 846 at 82.

<sup>915</sup> Liberty, ‘Liberty’s Report Stage Briefing on the Crime and Courts Bill in the House of Commons’, 2013, p 13, <<https://www.liberty-human-rights.org.uk/sites/default/files/liberty-s-hoc-report-stage-briefing-crime-and-courts-bill-march-2013-.pdf>> (accessed on 24/03/14).

#### **4.2.1 Arguments supporting the change to the ‘grossly disproportionate force’ test**

There are a number of arguments that support the change in the law in respect of homeowners. Accordingly, there are several reasons why the amendment will have been well received, and welcomed by some. These include (i) “the author of his misfortune approach”;<sup>916</sup> (ii) the need to increase the protection afforded to the public and increase the comfort zone before prosecutions take place; (iii) the uncertainty of the reasonable force test; (iv) the assertion that weak standards of self-defence increases crime rates; and, (v) the previous prosecutions of householders. These five issues will be dealt with in turn.

##### **4.2.1(a) The intruder has caused the need for self-defence**

The first argument in favour of permitting ‘disproportionate force’ is that the intruder has caused the need for the defence, and should accept responsibility for all actions that ensue. This is a forceful and common approach and is not exclusive to the householder defence.<sup>917</sup> It is said to be a view held by many members of the British public. ICM Research conducted a poll on behalf of *The Sunday Telegraph* in 2009, which found that ‘79 per cent of all voters would support changing the legal test from “reasonable force” to “grossly disproportionate” force’.<sup>918</sup> One argument why this approach would be favoured is captured by the saying, “the author of his own misfortune”. In other words, a person who attacks property infringes the rights of the owner and in so doing, should accept that there is an accompanying risk to his own life. However, most people who are familiar with the law would reject this idea, as the law is already positively skewed in favour of the householder. Usually, unless there are exceptional circumstances that fall outside the scope of self-defence, no prosecutions or convictions follow in householder cases. There is a risk that the changes could be detrimental,<sup>919</sup> and this will be discussed shortly.

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<sup>916</sup> This is the common notion as discussed by Tadros that ‘wrongdoers deserve to suffer for their wrongs’. V.Tadros ‘The Architecture of Criminalization’, *op cit* fn 559 at 79.

<sup>917</sup> This argument arises in relation to all forms of self-defence, but has perhaps been emphasised to a greater extent with the householder debate. See page 179 in relation to the assertions made by David Cameron in relation to burglars.

<sup>918</sup> *Sunday Telegraph*, “Overwhelming Support for Campaign to Protect Householders who Confront Intruders”, (20 December 2009).

<sup>919</sup> P.Strudwick ‘Grayling's Plan for Tackling Burglars? A Disproportionate Farce:

Nevertheless, it seems that the change to allow anything up to ‘grossly disproportionate force’ is considered insufficient in many people’s opinion. Research by YouGov has found that 75 per cent of those who took part in their survey supported further changing the test to allow any force that the individual deems necessary.<sup>920</sup> This would be an extensive expansion of self-defence, removing the reasonableness requirement. In the article accompanying the survey result by Dahlgreen on the YouGov website, which sets out the legal position, the legal interpretation is unfortunately misleading.<sup>921</sup> If the same misleading information within the article was provided to the participants prior to answering the survey, this could be a contributing factor to the high percentage supporting further change beyond the grossly disproportionate force test. For example, the article discusses the case of Andrew Woodhouse, and comments that there are far too many loopholes within the law. Dahlgreen states that ‘*A fight cannot take place outside (as did Mr Woodhouse’s), for example, nor can it be to protect oneself or one’s family – only the home*’,<sup>922</sup> but this is not entirely accurate. Under the householder provision, the requirement is merely that the attack occurs within the home. Providing that this requirement is met, then acting to protect oneself or another will be sufficient. It is a misleading statement as it implies that the individual must merely be acting to protect the home itself. Thus, the public opinion, although based on a potentially incomplete understanding of the application of the law, is a significant factor in the arguments supporting the change.

#### **4.2.1(b) Providing increased protection to the public by increasing the ‘comfort zone’ before legal intervention**

The second argument in favour of the changes advances that there is a need to provide increased protection to the public, and a wider safety net for those defending

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When Intruders Burst into My Flat There Was No Law Allowing Disproportionate Force – Which is Why I’m Still Here to Tell the Tale’, (*The Guardian*, 9 October 2012), <<http://www.guardian.co.uk/commentisfree/2012/oct/09/grayling-burglars-disproportionate-farce>> (accessed on 24/10/12).

<sup>920</sup> W.Dahlgreen ‘Extend ‘Bash a Burglar’ Law, Say Public’, (*YouGov*, 4 February 2014), <<http://yougov.co.uk/news/2014/02/04/extend-bash-burglar-law-say-public/>> (accessed on 20/02/2014).

<sup>921</sup> *ibid.*

<sup>922</sup> *ibid.*

themselves against intruders in their homes. The Justice Secretary at the time, Chris Grayling, presented this argument by emphasising the importance for the public to have confidence that the law is on the householder's side.<sup>923</sup> There is a concern that occasionally it appears that the true victims of crime are more readily prosecuted than the criminals who assail them.<sup>924</sup> This is connected to the previous argument, but focuses on ensuring that the law is balanced in favour of the householder as opposed to intruders. While it is indeed a worrying notion that the innocent defender is punished, it is asserted that lawful instances of self-defence will not result in criminal charges, as the test of reasonable force will provide sufficient protection.

The basic claim of this argument is that there is a need to provide a greater 'comfort zone' before legal intervention takes place in the chain of events following an incident where defensive force has been used. Grayling asserted that the criminal justice process, even if the case does not eventually reach the court, is extremely distressing for the individuals concerned and their families. He therefore claimed that unless it appears that the homeowner has used grossly disproportionate force, they should not have to go through the process at all.<sup>925</sup> This view aims to avoid the difficult experience of the criminal justice process for the true victim of crime, to ensure that they are not punished for their defensive actions.<sup>926</sup> However, as already mentioned,<sup>927</sup> this argument is flawed, as some degree of procedure is inevitable. In order to determine whether 'grossly disproportionate force' has been used, some level of investigation is required. There must be a degree of accountability, and a level of procedural judgement to go through when such sensitive and serious matters are concerned. The Code for Crown Prosecutors and their two-stage test effectively achieves this aim, and strikes an appropriate balance.<sup>928</sup> Claiming that homeowners who have killed in self-defence should not go through any mechanism of criminal

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<sup>923</sup> Conservatives, Speeches, 2012: Chris Grayling, <[http://www.conservativepartyconference.org.uk/Speeches/2012\\_Chris\\_Grayling.aspx](http://www.conservativepartyconference.org.uk/Speeches/2012_Chris_Grayling.aspx)> (accessed on 19/07/13).

<sup>924</sup> J.L.Malcolm 'Joyce Lee Malcolm on Threats to Our Second Amendment Rights', (*NRA News*, 19 March 2012), <<http://www.youtube.com/watch?v=IShFbQHgoqQ>> (accessed on 20/11/13).

<sup>925</sup> C.Grayling, *You Tube: Chris Grayling v Michael Wolkind QC on Household Defence*, <<http://www.youtube.com/watch?v=Ytwh3pHcrkg>> (accessed on 01/10/12).

<sup>926</sup> A similar argument is presented in D.Barrett & R.Lefort 'Right to Defend Yourself: Cases Undermine Keir Starmer's Claim Current Law Works Well', (*The Telegraph*, 3 January 2010), <<http://www.telegraph.co.uk/news/uknews/crime/6924005/Right-to-Defend-Yourself-cases-undermine-Keir-Starmers-claim-current-laws-work-well.html>> (accessed on 19/05/11).

<sup>927</sup> See page 182, section 4.2.

<sup>928</sup> See previous discussion on page 182.

procedure is untenable. Applying a standard of ‘grossly disproportionate force’ merely replaces one test with another. This, in itself, changes but does not remove the requirements placed on defenders by the criminal justice system.

Another similar argument prioritizing the protection of the householder is provided by Watson, namely, that ‘*a strong case can be made for establishing a presumption that force used in self-defence – and defence of the home – is reasonable and lawful*’.<sup>929</sup> Watson argues that when a society has been disarmed, (appreciating that few would wish to live in a society where weapons are necessary for protection), it becomes the responsibility of the state to protect its citizens by ensuring safe standards of living through adequate measures of crime prevention. He claims that ‘*If the state cannot fulfill its side of the bargain, its courts should not be too hard on those who (in the heat of the moment) use more force than may later seem reasonable*’.<sup>930</sup> This is a logical premise. However, on a literal interpretation, this burdens the state with bearing the blame for the commission of any and all crimes, by virtue of failures in prevention. It is also problematic to assume in all cases that the defensive force used in the home was reasonable and lawful. The establishment of this wide presumption could lead to significant injustice, and complete disregard of the human rights considerations in respect of the intruder.

#### **4.2.1(c) The uncertainty of ‘reasonable force’**

The third argument in favour of the change claims that the test of ‘reasonable force’ is too unclear and uncertain.<sup>931</sup> This is based on the perception that the applicability of the defence is unpredictable, and that the rules of self-defence should be more specifically defined. The desired effect is therefore to reach a position where people know exactly what they may and may not do in lawful self-defence.

The new test, however, will not ensure greater clarity in the law. It is likely, rather, to have the opposite affect by adding more confusion. Extending the actions that may be taken in self-defence in the home, but changing the subjective test of reasonable force

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<sup>929</sup> M.Watson ‘Self-defence and the Home’ (2003) 167 *Criminal Law and Justice Weekly* (formerly *Justice of the Peace*) 486, at 486.

<sup>930</sup> *ibid.*

<sup>931</sup> I.Dennis ‘Editorial: What should be done about the Law of Self-defence?’, *op cit* fn 860 at 417.

into another subjective test of grossly disproportionate force, leads to two different tests of self-defence. The determination of which test applies is dependent on location and the status of the aggressor and defender as trespasser and householder, and thus further complicates the application of the defence.

This topic splits public as well as academic opinion. While the majority of academic writing supports the test of 'reasonable force' for self-defence,<sup>932</sup> it appears that there is a substantial clash between popular opinion and the academic view on this issue.<sup>933</sup> As previously discussed, the reasonableness requirement allows appropriate flexibility within the law, while barring actions that go beyond self-defence.<sup>934</sup> However, Malcolm to the contrary argues in support of the 'grossly disproportionate force' test. She has written extensively on the subject of self-defence and gun control, within comparative studies between the US and the UK.<sup>935</sup> Malcolm's arguments are discussed below.

#### **4.2.1(d) Weak standards of self-defence result in increased crime rates**

The fourth argument for the test is the assertion that the approach of the law in England and Wales has had a damaging effect on crime statistics.<sup>936</sup> Malcolm claims that the results of the law of self-defence in England and Wales have been drastic, that there has been '*a doubling of gun crime in the last decade, a 25% increase in contact theft ... a 23% risk of being a crime victim*'.<sup>937</sup> While there may be a degree of truth in this assertion, it must be stressed that changes in the incidence of crime cannot simply be ascribed to the law of self-defence alone, without adducing further correlative evidence. Such proof is not provided in her research. Ashworth provides a context for this argument, and contrasts slightly with Malcolm's claims in terms of the incidence

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<sup>932</sup> As will become evident in section 4.2.2 when discussing the arguments opposing the test.

<sup>933</sup> R.L.Lerner, *op cit* fn 256 at 332.

<sup>934</sup> See section 2.1.1 in Chapter 2.

<sup>935</sup> For example, her publications not only include academic texts, such as J.L.Malcolm *Guns and Violence: The English Experience*, *op cit* fn 359; but also sensationalist news reporting, see for example J.L.Malcolm, 'Why Britain Needs More Guns', (*BBC News*, 15 January 2003), <[http://news.bbc.co.uk/1/hi/uk\\_politics/2656875.stm](http://news.bbc.co.uk/1/hi/uk_politics/2656875.stm)> (accessed on 11/07/14); and J.L.Malcolm 'The Soft-on-Crime Roots of British Disorder', (*The Wall Street Journal*, 16 August 2011), <<http://online.wsj.com/news/articles/SB10001424053111903918104576502613435380574>> (accessed on 11/07/14).

<sup>936</sup> J.L.Malcolm 'Joyce Lee Malcolm on Threats to Our Second Amendment Rights', *op cit* fn 924.

<sup>937</sup> J.L.Malcolm 'Self-defence in England: Not Quite Dead' (2011) 23 *Journal of Firearms and Public Policy* 60, at 60.

of crime, and the impact of weapons legislation on crime. Ashworth highlights the difference between the USA and Britain, and says ‘... *it seems that there are around 12,000 homicides a year in the United States involving guns ... Gun control is also a major issue in the United Kingdom: even though the scale of the problem is very different*’.<sup>938</sup> This raises questions regarding Malcolm’s claims.<sup>939</sup> While she contrasts the position in the UK and the US, where there are greater rights of self-defence and the right to bear arms, she claims that the restriction of these liberties has resulted in increased crime rates in England and Wales.<sup>940</sup> The situation across the Atlantic suggests otherwise, as the crime rates in the US are significantly higher, despite the more lenient approach to self-defence employed.

There is some support for Malcolm’s assertion regarding crime rates in a statement by Samuels explaining that dwelling burglaries are rare in the US because householders are armed with firearms.<sup>941</sup> Unfortunately, Samuels does not supply any corroborative evidence or detailed discussion, and therefore this statement alone does not strengthen the argument. Similarly, Bernard argues that there was far less armed crime in 1900, when gun control was minimal, than there is now under extensive regulation.<sup>942</sup> Nevertheless, there is no acknowledgment that there are more variables here than merely the regulation levels, as society has evolved significantly during this period. Further, considering the downward trend in crime overall in England and Wales, as found by the Crime Survey for England and Wales 2013, and the surveys in previous years, these arguments are unconvincing. The estimates for burglaries for the period of 2012/2013 were down by 11 per cent compared with 2007/2008;<sup>943</sup> although there

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<sup>938</sup> A.Ashworth ‘Editorial: Firearms and Justice’ *op cit* fn 19 at 447. The scale of the problem in the UK is ‘an average of 47 homicides involving a firearm in the three years 2008/9, 2009/10, and 2010/11’, significantly less than in the US.

<sup>939</sup> Indeed, Charles is critical of the lack of evidence she adduces to support her assertions, which he argues are based on misinterpretations. P.J.Charles “‘Arms for their Defence’?”, *op cit* fn 611 at 371.

<sup>940</sup> Squires criticises Malcolm’s conflation of the law of self-defence with the restriction on weapons possession, which serve different purposes. He also refutes the claim that more weapons reduce crime, explaining that this is not the general perception in the UK. P.Squires ‘Beyond July 4<sup>th</sup>?: Critical Reflections on the Self-defence Debate from a British Perspective’ (2006) 2 *Journal of Law, Economics and Policy* 221, at 223-224.

<sup>941</sup> A.Samuels ‘More Changes to Criminal Justice – the Crime and Courts Act 2013’ (2013) 177 *Criminal Law & Justice Weekly* 328, at 328.

<sup>942</sup> D.Bernard, *op cit* fn 801 at 7.

<sup>943</sup> Office for National Statistics, *Statistical bulletin: Crime in England and Wales, Year Ending September 2013, Theft offences – Burglary*, (Table 11b), <<http://www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/period-ending-september-2013/stb-crime-in-england-and-wales--year-ending-sept-2013.html#tab-Theft-offences---Burglary>> (accessed on 21/03/14).



was a 2 per cent increase in thefts from the person from the previous year, this was not considered statistically significant.<sup>944</sup> Offences involving firearms are also in decline, down by 5 per cent on the previous year.<sup>945</sup>

While it is difficult to compare these statistics accurately as they are based on different crimes and recording methods, the reliability of Malcolm's claims must be questioned in light of the statistical data available.

Malcolm also argues that the new test allowing anything up to 'grossly disproportionate' force is commendable as it prioritises householders by increasing their rights.<sup>946</sup> Writing before the changes came into force, she concluded that '*there is reason to hope that former standards of respect for what Blackstone saw as the first great and primary right, the right of personal security will return to Great Britain*'.<sup>947</sup> However, nowhere in her article does she mention the justification behind self-defence. She merely refers to it as a 'right of self-defence' without attempting to substantiate why it should be considered a 'right'. As previous discussion has demonstrated in Chapter 2, it is considerably harder than it seems to justify the defence. Therefore, although she alludes to the history of self-defence and specifically the laws regarding weapons as a basis for the right, this is insufficient in light of considerable societal changes, requiring more robust arguments to provide a foundation for supporting the 'grossly disproportionate force' test.

#### **4.2.1(e) Previous prosecutions of householders**

A final argument for the change is based on previous cases where homeowners have been punished for their defensive actions. Watson discusses cases involving defensive

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<sup>944</sup> Office for National Statistics, *Statistical bulletin: Crime in England and Wales, Year Ending September 2013, Theft Offences - Other Theft of Property*, <<http://www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/period-ending-september-2013/stb-crime-in-england-and-wales--year-ending-sept-2013.html#tab-Theft-offences---Other-theft-of-property>> (accessed on 21/03/14).

<sup>945</sup> Office for National Statistics, *Statistical bulletin: Crime in England and Wales, Year Ending September 2013, Theft offences - Offences Involving Firearms*, (Tables 10a and 10b), <<http://www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/period-ending-september-2013/stb-crime-in-england-and-wales--year-ending-sept-2013.html#tab-Offences-involving-firearms>> (accessed on 21/03/14).

<sup>946</sup> J.L.Malcolm 'Self-defence in England: Not Quite Dead', *op cit* fn 937 at 69.

<sup>947</sup> *ibid*, at 72.

force against intruders.<sup>948</sup> He mentioned the case of Mr Newbery, a 76-year-old man who shot an intruder whilst he attempted to break into his garden shed. Mr Newbery was arrested, prosecuted, and the jury acquitted him of criminal charges, but his aggressor was awarded damages for the injury he suffered.<sup>949</sup> Although the case did not result in a conviction, it does demonstrate the difficult position facing homeowners when proving self-defence.

A different outcome was reached in the case of Barry Lee Hastings in 2002, a 25-year-old man who arrived at his wife's (from which he was separated) and children's home to find a burglar inside. The burglar was on the run from the police at the time, and was stabbed by Hastings. He had mistaken the burglar's weapon; he had thought the crowbar was a machete. The result of the case was that Hastings was convicted of manslaughter and given a five-year sentence, as '*a householder is not entitled to use more than reasonable force to defend himself*'.<sup>950</sup> The force was deemed unreasonable in this case.<sup>951</sup> The fact that he had mistaken the nature of the weapon was immaterial, as he had repeatedly stabbed the intruder 12 times, while outside the property and not facing a direct threat to himself. This is a clear example of excessive force. While the court accepted that it is reasonable for individuals to pick up a weapon, the manner in which the kitchen knife had been used in this case was inconsistent with self-defence, although provocation could be relied upon.<sup>952</sup>

There will always be cases that fall outside the scope of self-defence, because it is a complete defence, and certain conditions must be met in order for the defence to be available. Indeed, even the test of 'grossly disproportionate force' would not change the outcome in some cases, such as that of *Hastings*, as the force will go beyond the

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<sup>948</sup> M. Watson 'Self-defence and the Home', *op cit* fn 929 at 486.

<sup>949</sup> *Revill v Newbery* [1996] QB 567. This was a case from 1996, and the law has since been changed by the Criminal Justice Act 2003 to restrict civil claims of trespass to the person by the aggressor against the defender. Section 329 is the governing provision and restricts permission for proceedings to cases where the defender has used grossly disproportionate force.

<sup>950</sup> M. Watson 'Self-defence and the Home', *op cit* fn 929 at 486.

<sup>951</sup> *R v Hastings* *op cit* fn 768. He appealed against his conviction and sentence. The former was rejected, but the latter was allowed, and his custodial sentence was reduced to three years.

<sup>952</sup> *ibid*. Lord Woolf, then Lord Chief Justice, emphasised that the reduced sentence was a reflection of the circumstances and the appellants' previous good character, and did not advocate the use of a knife in this manner in such circumstances.

standard required.<sup>953</sup> While one may be able to rely on the use of disproportionate force, one would still have to prove that the force was necessary, and therefore might not gain the enhanced protection.

Although there are a number of arguments in favour of the change, it is submitted that there are many more and potentially stronger arguments in opposition to the new test. These will now be discussed.

#### **4.2.2 Arguments opposing the change to the ‘grossly disproportionate force’ test**

There are a number of reasons why the test of ‘reasonable force’ should not have been amended. In contrast to the views supporting the test of ‘grossly disproportionate force’ in self-defence, the majority of academic and media debate in the UK on the matter takes the opposite view.<sup>954</sup> The arguments advanced include (i) the potential incompatibility with the ECHR; (ii) the lack of justification behind the amendment; (iii) the creation of confusion; (iv) the risk of vigilantism; (v) the scope for revenge; and (vi) the role of politics and public perception as the instigators of the law reform and the lack of understanding of the law.

##### **4.2.2(a) Possible incompatibility with the European Convention of Human Rights**

The first argument against the test relates to the ECHR, which states clearly in Article 2(2) that the force used must be no more than ‘absolutely necessary’. There is a real possibility that the new amendment would breach this exception to the general prohibition on interference with one’s life. Disproportionate force inherently suggests a lack of necessity, that there was another, less grave alternative available, and that the individual used excessive force. Harris refers to the implicit need for proportionality within a standard of ‘absolutely necessary’, explaining that lethal force should be ‘*strictly proportionate to the achievement of the permitted*

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<sup>953</sup> The same is true of the cases of *R v Martin op cit* fn 102, (discussed at section 4.3.3), and *R v Hussain and another* [2010] EWCA Crim 94 (discussed at 4.3.4).

<sup>954</sup> The Crime and Courts Act 2013 gave rise to much debate at The Society of Legal Scholars (SLS) Conference in Edinburgh in September 2013. For example, Catherine Elliott and Lydia Bleasdale-Hill are notable examples of this academic debate, and both views are discussed in this section.

*purpose*'.<sup>955</sup> This is certainly appropriate, and as Uniacke proclaims, the proportionality requirement merely instigates '*an upper limit to the harm a defender might inflict on an attacker*'.<sup>956</sup> It is not an overly onerous standard for the defender to adhere to, and allows a balancing of the competing human rights.

In 2008 the Joint Committee on Human Rights expressed concern about the safeguarding of Article 2 within the law of self-defence in England and Wales.<sup>957</sup> It clearly stated:

*'If the criminal law were amended to permit the use of disproportionate force in self-defence or to prevent crime, the UK would be in breach of its obligation to ensure that its criminal law provides adequate protection for the right to life in Article 2 ECHR and the right to physical integrity in Article 8 ECHR'*.<sup>958</sup>

This ground is therefore a strong opposition to the new test. Before the change came into effect, during the Bill stage, letters were exchanged between the then Minister of State for Justice, The Right Honourable Lord McNally, and the then Chair of the Joint Committee on Human Rights, Dr Hywel Francis MP. The former wrote to the latter addressing these concerns.<sup>959</sup> It was explained that the Government considered the changes to be compatible with the right to life as provided in the Convention, as the overarching test would remain one of reasonableness.<sup>960</sup> As the new standard would only apply where a householder genuinely believed that there was a trespasser in his home, this was regarded as a sufficient standard to safeguard the right of the aggressor. This fails to indicate precise reasons for such a finding, and displays a disappointing lack of regard for the issue.

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<sup>955</sup> D.Harris 'The Right to Life Under the European Convention on Human Rights' (1994) 1 *Maastricht Journal of European & Comparative Law* 122, at 132.

<sup>956</sup> S.Uniacke 'Proportionality and Self-defense', *op cit* fn 60 at 255.

<sup>957</sup> Joint Committee on Human Rights, *Legislative Scrutiny: Criminal Justice and Immigration Bill*, (2007-08), 2.21-2.35.

<sup>958</sup> *ibid*, at 2.24.

<sup>959</sup> Letter from The Right Honourable Lord McNally to Dr Hywel Francis MP (27 November 2012), <[http://www.parliament.uk/documents/joint-committees/human-rights/Lord\\_McNally\\_on\\_Crime\\_and\\_Courts\\_Bill.pdf](http://www.parliament.uk/documents/joint-committees/human-rights/Lord_McNally_on_Crime_and_Courts_Bill.pdf)> (accessed on 30/06/14).

<sup>960</sup> Also emphasised by the Ministry of Justice, 'Crime and Courts Bill: Supplementary European Convention on Human Rights Memorandum', (27 Nov 2012), <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/184742/delegated-powers-echr-memorandum.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/184742/delegated-powers-echr-memorandum.pdf)> (accessed on 25/05/15), at 1.

It can be argued that the new amendment to the law of self-defence in England and Wales is incompatible with the Convention's right to life. This is a serious contention, but is a realistic problem with substance. The answer to this question is for the European Court of Justice to determine if and when a case of incompatibility is directed. The householder provision has not yet been directly challenged, and previous decisions such as *McCann v UK*<sup>961</sup> have addressed a different issue, namely the use of lethal force by the state against private citizens, and the question of mistaken belief. Although pivoting on a different question of incompatibility, the case law suggests that there is a need for good reason, or a reasonable belief, whereas the law of England and Wales permits an honest belief. Despite the fact that the court found no incompatibility,<sup>962</sup> it may be argued that the standard required to safeguard convention rights is higher than that applied.<sup>963</sup> While forming a persuasive authority, the case clearly did not consider the use of disproportionate force, and should not be relied upon as refuting a claim of incompatibility.

#### **4.2.2(b) The lack of justification for the amendment**

The second argument is that there is a lack of clear justification for the changes which cannot easily be reconciled with self-defence theory. Bleasdale-Hill has attempted to find a justification for the changes introduced by the 2013 Act.<sup>964</sup> She draws attention to the flawed generalisations made whilst debating the Act during its Bill stage, claiming that the amendment to the law had been justified by 'political expediency'.<sup>965</sup> Section 4.2 of this chapter has already examined the debate of the Public Bill Committee, but Bleasdale-Hill's examination of individual justifications merit further consideration. In her analysis, she referred to the theories of consequentialism, rights and forfeiture, autonomy, and the social-legal order.<sup>966</sup>

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<sup>961</sup> *McCann v United Kingdom* (1996) 21 EHRR 97.

<sup>962</sup> T.A.Cross 'Article 2 ECHR and "Mistaken Belief" in the Prevention of Crime: A Re-Evaluation Post-Bennett' (2006) *JR* 180, at 182.

<sup>963</sup> F.Leverick 'Is English Self-defence Law Incompatible with Article 2 of the ECHR?', *op cit* fn 207 at 348. See also the discussion in Chapter 2 of this thesis.

<sup>964</sup> See generally L.Bleasdale-Hill "'Our Home is Our Haven and Refuge – a Place Where we Have Every Right to Feel Safe": Justifying the Use of up to "Grossly Disproportionate Force" in a Place of Residence', *op cit* fn 12.

<sup>965</sup> L.Bleasdale-Hill 'Justifying the Use of 'Grossly Disproportionate' Force in a Place of Residence' (SLS Conference, Edinburgh, September 2013), abstract available at <<http://archive.legalscholars.ac.uk/edinburgh/abstract.cfm?id=37>> (accessed on 16/11/13).

<sup>966</sup> The various theories which justify self-defence were explored in Chapter 2.

Consequentialism, of course, gives considerable weight to the consequences of the action concerned. Bleasdale-Hill considers that there is nothing to prove that an attack occurring in the private sphere is any worse in terms of consequences than an attack in the public sphere. This view is logical and will be considered in relation to the discussion on the sanctity of the home shortly. The consequences of an attack could be the same, or worse in a public place than in the home, therefore it is impossible to state with certainty that attacks in the home always produce graver consequences. This leaves an unfilled void in respect of why greater force should be permitted in the home than in a public place. The theory fails to address the enhanced level of protection to householders.<sup>967</sup>

Therefore, she considers the theory of rights and forfeiture in pursuance of a potential explanation for the division of the tests of self-defence. A possible argument is that the forfeiture of rights occurs more readily in the private sphere than in the public sphere.<sup>968</sup> This suggests that aggressors retain their rights more in public places, than they do in private places. This is often one of the most cited reasons for the change, namely that an intruder into one's home offends the homeowner's property and privacy rights so severely, that the intruder's own rights must be regarded as forfeited.<sup>969</sup> However, this does not in itself justify the change in the test, as the previous standard already took this into account. There is no clear reason why a different level of forfeiture should apply depending on the location of an attack. The aggressor's position should not change in this regard, as location is not the justificatory element in the theory of forfeiture; it is the posing of an unjust attack that matters.

Bleasdale-Hill turns to consider the principle of autonomy as a possible justification. This could be considered the most convincing option, as all individuals have a right to their own autonomy, in other words, to be free from outside interference. In this respect, it is the defender's autonomy that is considered, as it is this right that is infringed by the aggressor. What may be argued here, as a justification of the change

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<sup>967</sup> See for example, L.Bleasdale-Hill "Our Home is Our Haven and Refuge – a Place Where we Have Every Right to Feel Safe", *op cit* fn 12 at 413-414.

<sup>968</sup> *ibid*, at 415.

<sup>969</sup> As discussed in section 4.2.1(a) of the present chapter, the 'author of his own misfortune' approach.

of test, is that a greater interference of autonomy occurs when an intruder is in the defender's home, than when an attack occurs in a public place. However, this does not conclusively justify the changes in the law either, as Bleasdale-Hill highlights - there is no absolute right to autonomy.<sup>970</sup> If autonomy is something that all individuals usually possess, then that must be so regardless of their particular location, which should have no bearing on the matter. Thus, householders defending in their homes possess the same level of autonomy as if they were in a public place. Nevertheless, it may be said that one's autonomy is possibly reduced in public places as one must comply with standard rules of behaviour, and that due to the connected rights of privacy and ownership, one would have slightly more autonomy in one's own home.<sup>971</sup> For this reason, this argument appears to provide some support for the statutory changes, but it is unconvincing.

The final theory that she considers is a justification presented by Sangero,<sup>972</sup> that of the social-legal order. According to this justification, the permissibility of using defensive force strengthens the public's confidence in the legal system, and clarifies the individual's place within the system. While this certainly appears to be the most obvious reason why the test was changed, to satisfy the public that the law favours innocent householders over criminals who invade their homes, the extended protection does not benefit the social-legal order. Bleasdale-Hill regards this justification as being too vague to present a compelling argument,<sup>973</sup> and unsuccessful as it cannot permit disproportionate actions.<sup>974</sup> Indeed, considered by itself it is an insufficient explanation, as it does not rely on any evidence of a failure in the law causing injustice.

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<sup>970</sup> L.Bleasdale-Hill "Our Home is Our Haven and Refuge – a Place Where we Have Every Right to Feel Safe", *op cit* fn 12 at 416.

<sup>971</sup> For a more detailed discussion of this, see Chapter 5 on 'attachment, meanings and identity,' especially Geriyn's views on the impact of location upon behaviour.

<sup>972</sup> This was discussed in Chapter 2. See B.Sangero *Self-Defence in Criminal Law*, *op cit* fn 73 at 99 and 102; B.Sangero 'A New Defense for Self-Defence' *op cit* fn 61; and B.Sangero 'In Defense of Self-defence in Criminal Law; and on Killing in Self-defence – a Reply to Fiona Leverick' (2010) 44(6) *Criminal Law Bulletin* 3, at 6 and 16.

<sup>973</sup> L.Bleasdale-Hill 'Justifying the Use of 'Grossly Disproportionate' Force in a Place of Residence' *op cit* fn 965.

<sup>974</sup> L.Bleasdale-Hill "Our Home is Our Haven and Refuge – a Place Where we Have Every Right to Feel Safe", *op cit* fn 12 at 418.

Thus, none of the common theories of justification of self-defence succeed in explaining the need for a ‘grossly disproportionate force’ test for householders. This is problematic as any test of self-defence must be theoretically justifiable before it may be considered a valid and appropriate standard to apply. It further highlights that standards of self-defence should be applied in the same way regardless of location, and that the relevant consideration that should be applied is whether the force used was reasonable in the circumstances.

#### **4.2.2(c) Creating confusion not clarity**

The third argument against the new test is that it will not produce the enhanced clarity in the law that is desired. One of the main calls for a change in the law arises from a belief that the reasonable force test is too vague. While it is both necessary and advisable to ensure enhanced clarity in the law, and attempt to make it more accessible to the public to understand the parameters and limits of the defence, achieving the certain answers that the public seek is not practically attainable. It is not possible to state exactly what actions are permissible and impermissible in self-defence, and to specify what type of injury may and may not be inflicted on an intruder,<sup>975</sup> because flexibility is a fundamental part of the defence. Attempts to make the law more prescriptive on the matter could in fact have the opposite effect of making it far more restrictive, as it would specify each individual circumstance that satisfies self-defence, and would naturally have to draw the line with some actions.

It is unlikely that changing the test to grossly disproportionate force will provide any improvement regarding the clarity or certainty of the law. The test of ‘reasonable force’ is formed in a way that a householder who kills or injures a burglar will have a complete defence, if the force used was reasonable in the defence of oneself, one’s family, or property. It is unclear why this required changing. In response to the argument that the ‘reasonable force’ test is unclear and does not provide certainty, Miller says that, *‘widening the scope with regard to what homeowners can do to intruders only extends the permitted violence – it does not clarify the law any further. It is still within the court’s discretion to judge what is ‘grossly disproportionate’*

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<sup>975</sup> R.Manning *Justifiable Force: The Practical Guide to the Law of Self Defence*, op cit fn 841 at 66.



*rather than 'reasonable'*.<sup>976</sup> For this reason, to be a valid justification of the amendments made to the law, it would surely have to apply across the board, in all instances of self-defence, not merely within householder cases. If 'reasonable force' is such an unclear test, how can it be logical to change its application in only one circumstance? Most likely, the reason for this rests precisely on the unnecessary nature of the amendment. The 'grossly disproportionate' force test would be unworkable as a general standard, as it is an inappropriate measure of self-defence.<sup>977</sup>

Catherine Elliott considered the difficulty in changing the test of reasonable force to 'grossly disproportionate' force in the context of the home. She argued that Parliament was attempting to change the definition of what is reasonable, by extending its contours to include disproportionate force, thus, claiming that disproportionate force is reasonable.<sup>978</sup> This argues that the test is therefore at odds with the interpretation of the word 'reasonable'. It clearly conflicts with the previous standard applied, and expands the scope of what can be considered 'reasonable', as until the Act of 2013 came into force, in order for an action to be considered reasonable, it also had to be proportionate.

Elliott challenged this wider interpretation of reasonableness,<sup>979</sup> arguing that the courts should interpret the new statutory test in accordance with the rule of law; the common law's long established concept of reasonableness; and also, in line with the European Convention of Human Rights.<sup>980</sup> She reinforced the belief held by many academics and criminal lawyers that the test of 'reasonable force' strikes the correct balance in cases of self-defence, regardless of the location at which the defence occurs. This is a logical argument which demonstrates the complications which may arise as a result of the change, as the standard required will need to be reinterpreted to fit this specific instance.

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<sup>976</sup> S.Miller 'Grossly Disproportionate': Home Owners' Legal License to Kill', *op cit* fn 12, at 305.

<sup>977</sup> Again, this raises the issue why different locations should merit different standards within the law in this context, which will be examined in Chapter 5.

<sup>978</sup> C.Elliott 'Interpreting the Contours of Self-Defence within the Boundaries of the Rule of Law, the Common Law and Human Rights' (SLS Conference, Edinburgh, September 2013), abstract available at <<http://archive.legalscholars.ac.uk/edinburgh/abstract.cfm?id=4>> (accessed on 16/11/13); and C.Elliott 'Interpreting the Contours of Self-defence within the Boundaries of the Rule of Law, the Common Law and Human Rights', *op cit* fn 12 at 331.

<sup>979</sup> *ibid.*

<sup>980</sup> The potential incompatibility with the ECHR was considered under subheading 4.2.2(a).

**4.2.2(d) Creating a risk of vigilantism and the irony of increasing the dangers faced by householders**

The fourth argument against the new test relates to the potential dangers that are created by allowing ‘grossly disproportionate force’ to be used. It is suggested that people will be more likely to take matters into their own hands, and the likelihood is far greater that they will act beyond what is necessary in self-defence.<sup>981</sup> Turner discusses the risks created by the new legislation, and claims that ‘*it may even encourage people to think that acts of vigilantism are now ratified. As the Trayvon Martin case has demonstrated, this can go horribly wrong*’.<sup>982</sup> The Trayvon Martin case is a tragic example from Florida, demonstrating how increased rights can lead to extreme acts, which would formerly fall outside the law, being held lawful.

Trayvon Martin was shot dead in February 2012 by George Zimmerman, who was acquitted of the crime due to Florida’s ‘stand your ground’ law. Martin was an African-American high school student and Zimmerman a neighbourhood watch captain who considered him to be acting suspiciously, and claimed to have shot him in self-defence. The case sparked international outrage as Martin was unarmed, and although Zimmerman had received some injuries from the altercation, he had pursued Martin, ignoring advice from the police, and used extreme force. Following this case and subsequent examples, there have been calls to repeal the ‘stand your ground’ approach of the law.<sup>983</sup>

Thus, as well as the danger of permitting greater force than necessary, the amendment also increases the risks to householders. Far from providing greater protection for homeowners, it could also have the counterproductive effect of placing them in

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<sup>981</sup> Abuznaid et al. have conducted research within the American context. They found that for States that have removed the duty to retreat, substituting it with a ‘stand your ground’ approach, and also permitting the carrying of concealed weapons (i.e. Florida), there has been an increase in gun ownership, and the number of cases where individuals decide to take matters into their own hands. A. Abuznaid et al. ‘Stand Your Ground’, *op cit* fn 197 at 1135.

<sup>982</sup> J. Turner ‘The UK’s New Self-Defence Law Opens the Door for a Trayvon Martin Case’, (*New Statesman*, 23 July 2013), <<http://www.newstatesman.com/law/2013/07/uks-new-self-defence-law-opens-door-trayvon-martin-case>> (accessed on 25/07/13).

<sup>983</sup> See for example A. Gruber ‘Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground’, *op cit* fn 197 at 962 and 974; A. Abuznaid et al. ‘Stand Your Ground’, *op cit* fn 197 at 1130-1132; E. Megale ‘A Call for Change: A Contextual-Configurative Analysis of Florida’s “Stand Your Ground” Laws’ (2013-2014) 68 *University of Miami Law Review* 1051, at 1097; and National Urban League, Mayors Against Illegal Guns & VoteVets.org, *op cit* fn 197.

danger, as criminals will be more likely to carry dangerous weapons knowing that they might need to fight for their lives.<sup>984</sup> Therefore, the level of violence is escalated as opposed to controlled.

#### **4.2.2(e) Leaving the door ajar for revenge**

This leads onto the fifth argument against the test, namely that it is contrary to the purpose of self-defence, and thus, creates room for revenge attacks. The *Tonight* show on ITV broadcast a special episode on self-defence and homeowners in September 2012, examining the story of Vincent Cooke, who had stabbed a burglar to death in his home. The show claimed that their research had found that thirty per cent of the British public did not believe that homeowners who have killed an intruder on their property should be arrested at all considering the circumstances. However, as Michael Wolkind QC, stated on the programme, this is undesirable because it leaves space for revenge within the defence.<sup>985</sup> An example of what is envisioned as a revenge situation in this context is a scenario where the defender is initially acting in self-defence, in desperation to save himself. However, when the defender succeeds in overpowering the aggressor, he exercises greater force than necessary, due to his feelings of wanting the aggressor to pay for his actions. The householder standard might consider the position reasonable, while the general standard might consider it excessive.

In a televised interview between Wolkind and former Justice Secretary Chris Grayling, (the Shadow Home Secretary at the time), the barrister stated that the grossly disproportionate test is ‘a horrible test’. He provided a contextual example of the stages that one might go through under the test, progressing along a gradient of disproportionality. He explained that the situation of self-defence, could develop as such:

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<sup>984</sup> K. Walker ‘Burglars Give up Any Human Rights’: David Cameron Gets Tough on Right to Defend Home’, (*Daily Mail*, 1 Feb 2010), <<http://www.dailymail.co.uk/news/article-1247600/Burglars-human-rights-David-Cameron-gets-tough-right-defend-home.html>> (accessed on 15/08/11).

<sup>985</sup> *ITV*, ‘Tonight: in Self-defence’, (27 September 2012). Wolkind is one of the UK’s leading barristers, and has experience as defence counsel in several high profile cases, such as Anthony Martin and the Hussain brothers.

*“If I manage to tackle a criminal and get him to the ground, I kick him once and that’s reasonable, I kick him twice and that’s understandable, three times, forgivable; four times debatable; five times, disproportionate; six times, it’s very disproportionate; seven times, extremely disproportionate - in comes the Tory test - eight times, and it’s grossly disproportionate. It is a horrible test. It sounds like state-sponsored revenge. I don’t understand why sentencing should take place in the home. Why can’t it go through the courts? Why can’t the jury, as they always do, decide what is reasonable?”*<sup>986</sup>

The ‘grossly disproportionate force’ test stretches too far beyond what should be considered as lawful actions of self-defence, which the law has aimed to preserve for so long. Although this is an exaggerated example, it conveys the extended nature of the test in a practical form.

The problem that this extension creates is that ‘*the law should always encourage people to be reasonable, not unreasonable, to be proportionate, not disproportionate*’.<sup>987</sup> The general standard required by the law achieves the goal of reasonableness by requiring necessity and proportionality. The change of test within the context of the home erodes the principles of self-defence, and reverses years of rational thinking. The high profile oppositions have been numerous, with Keir Starmer, the previous Director of Public Prosecutions, also expressing support for the test of reasonable force, rejecting suggestions that it should be changed. He emphasised that there are “*many cases, some involving death, where no prosecutions are brought*”,<sup>988</sup> providing another argument against the change of test; namely that there is nothing to prove its necessity. Very few householders were charged, which indicated that the law worked satisfactorily. A fair balance is already struck in the circumstances by considering the reasonableness of the action taken.

#### **4.2.2(f) Politics, public perception and the lack of understanding of the law**

The sixth argument against the change relates to the reasoning process behind the amendment, namely on what grounds it was justified. It is claimed that the main

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<sup>986</sup> Michael Wolkind QC, *Sky News: Property Householder Self-Defence Rights*, *op cit* fn 888.

<sup>987</sup> S.Lipscombe *Householders and the Criminal Law of Self-defence*, (House of Commons Library Standard Note: SN/HA/2959, 20 September 2012), at 4.

<sup>988</sup> BBC News, “DPP Rejects Call for Change in Self-Defence Law”, (28 December 2009), <[http://news.bbc.co.uk/1/hi/uk\\_politics/8432678.stm](http://news.bbc.co.uk/1/hi/uk_politics/8432678.stm)> (accessed on 01/10/12).

reason driving the amendment revolved around politics and public opinion. This view was asserted by the human rights organisation Liberty, which commented that the reform enacted in the Crime and Courts Act 2013, is ‘grim, head-line chasing at its very worst with dangerous repercussions for our society’.<sup>989</sup> Similarly, Mendelle, writing prior to the recent amendments, proclaimed his dismay at the manipulation of legislation for political gain:

*‘recent changes to the law of self-defence illustrate how much political posturing has supplanted reasoned debate in the field of criminal law ... the two main parties now take turns to pass wholly unnecessary legislation, for no better reason, as far as I can see, than to demonstrate how responsive they are to what they perceive to be the popular mood. Legislation is now deployed as a weapon in a PR war’.*<sup>990</sup>

The same opinion is held and is supported in this research, that the recent changes have been a product of party politics, and unsubstantiated evidence.<sup>991</sup>

Sensationalist reporting by the media can have a damaging impact as it applies pressure for action, when sometimes no action is required.<sup>992</sup> While public opinion can be an important and vital method of campaigning for law reform, and indeed can have substantial results, in this case it appears that the calls were misguided.<sup>993</sup> It would have been wiser in this instance for politicians and lawmakers to refrain from acting based on these grounds, and rather to heed the advice of those working within the system and dealing with the real cases. Husak is critical of legislating as a reaction to the power of public perception, and says:

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<sup>989</sup> Liberty, ‘Liberty’s Report Stage Briefing on the Crime and Courts Bill in the House of Commons’, 2013, *op cit* fn 915 at 13. Liberty criticised the law reform proposals in similar vein in a previous article for ‘play[ing] politics with human rights and the criminal law’. Liberty, ‘Lord Chancellor Misleads on the Law’, 10 Oct 2012, <<http://www.liberty-human-rights.org.uk/news/press-releases/lord-chancellor-misleads-law>> (accessed on 24/03/14).

<sup>990</sup> P.Mendelle ‘Self-defence Law Shows how Politicians use Legislation as PR’, *op cit* fn 876. This was even before the change to the test of ‘reasonable force’ to ‘grossly disproportionate’ force was introduced. The piece was written in response to the passing of section 76 of the Criminal Justice and Immigration Act 2008, which effectively provided a statutory statement of the common law principles.

<sup>991</sup> This was reflected in section 4.2 considering the debate on the legislation in its public Bill stage.

<sup>992</sup> See for example, M.Steyn ‘An Englishman’s Home is His Dungeon’, (*The Telegraph*, 7 December 2004), <<http://www.telegraph.co.uk/comment/personal-view/3613417/An-Englishmans-home-is-his-dungeon.html>> (accessed on 15/10/14).

<sup>993</sup> V.Cochrane ‘Allowing Disproportionate Force in Self-defence – a Triumph of Rhetoric over Reason’, (*Kingsley Napley Criminal Law Blog*, 9 May 2013), <<http://www.kingsleynapley.co.uk/news-and-events/blogs/criminal-law-blog/allowing-disproportionate-force-in-self-defence-a-triumph-of-rhetoric-over-reason>> (accessed on 22/11/13).

*‘The characteristics of criminal law are changing rapidly; whole new kinds of statutory schemes have been created. Largely in response to sensationalistic media accounts and the influence of political pressure groups, criminal laws are routinely enacted as though they were the natural response to any and all social problems’.*<sup>994</sup>

The media is arguably responsible for the public perception of the protection afforded by the law to homeowners to defend themselves in their homes against intruders.<sup>995</sup> This view is sometimes misinformed<sup>996</sup> and it can be dangerous to rely on these media representations,<sup>997</sup> which have led to public outcries demanding that the law be reformed to provide increased rights to homeowners who use force against intruders at their home.

One of the first cases to spark the public’s fury at the law in this field was that of the Norfolk farmer, Anthony Martin, who shot two burglars on his property, killing one and seriously injuring the other.<sup>998</sup> Another later widely reported case refuelled this anger within society when Munir Hussain was convicted of causing grievous bodily harm after he chased a man who held his family at knifepoint in their home and beat him with a cricket bat.<sup>999</sup>

However, according to Hogan ‘one thing we must not do is allow sympathy to cloud judgement’,<sup>1000</sup> which is pertinent in these cases. While home intrusions understandably generate strong emotions of fear and anger, the law already provides leniency and flexibility (through the test of reasonable force) in these situations. It is difficult to understand why people call for further protection, unless they simply do

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<sup>994</sup> D.Husak ‘Criminal Law Theory’, *op cit* fn 582 at 109.

<sup>995</sup> C.Gardner ‘On Self-defence, Let’s Trust the Courts’, (*The Guardian*, 21 Dec 2009), <<http://www.guardian.co.uk/commentisfree/libertycentral/2009/dec/21/self-defence-chris-grayling>> (accessed on 20/08/11).

<sup>996</sup> E.Smith, ‘The Problem with Reasonable Force: Rebalancing the Law in Favour of the Householder by Adopting Alternative Jurisdictional Approaches’ (2011) 1 *Southampton Student Law Review* 117, at 144.

<sup>997</sup> S.Yeo ‘Killing in Defence of Property’ (2000) 150 *New Law Journal* 730, at 730.

<sup>998</sup> N.Boden ‘Analysis: Self-Defence, Burglars and the Law’, (*Sky News Online*, 23 June 2011), <<http://news.sky.com/home/uk-news/article/16017460>> (accessed on 15/08/11); P.Squires ‘Beyond July 4<sup>th</sup>?: Critical Reflections on the Self-defence Debate from a British Perspective’, *op cit* fn 940 at 225.

<sup>999</sup> S.Almandras *Use of Force Against Intruders: Do “Have a Go Heroes” Need Greater Protection from Criminal Prosecution?*, *op cit* fn 878 at 93.

<sup>1000</sup> B.Hogan ‘Defence of Property’ (1994) 144 *New Law Journal* 466.

not understand the law in this context.<sup>1001</sup> It is true that the law is not absolutely precise, but the reason for this, as has already been mentioned, is that flexibility is crucial to its fair and just application in individual cases.

The problem does not lie in the law itself, as it provides a complete defence to those who use reasonable force against aggressors, but rather in the understanding of the law. Increased public awareness and improved guidance supplied to homeowners, rather than reforms, are likely to be the best way of dealing with this predicament. There appears to be confusion between the defence of property and the householder's right to defend oneself and one's family against intruders.<sup>1002</sup> Where there is a fear for safety, the use of force, even deadly force, is permitted. The very nature of home intrusions carries a risk to the homeowners and an instinctive reaction of fear.<sup>1003</sup> Therefore, unless there is clear evidence that the homeowners have no reason to fear for their safety, it is likely that the fear they felt when faced with an intruder would support a case of self-defence. The decision to change the test assumes an unreasonable legal standard, which is far from the reality of the legal approach, and has unnecessarily produced another statutory provision.

It is clear that the law of self-defence discriminates based on location, with separate standards applying for householders and people in public places. Another way in which the law in relation to householders and public places discriminates based on location is the situation regarding offensive weapons. The fact that one may have more objects (that may be used as weapons) to hand when defending in the home than in public places is a matter of chance as well as law, because the act of carrying a weapon is intrinsically offensive, not defensive. This is the next topic under consideration.

### **4.3 Location and its relation to weapons**

According to the legislation prohibiting the carrying and use of offensive weapons and bladed articles, these offences must be committed in a public place. As noted

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<sup>1001</sup> F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 139.

<sup>1002</sup> *ibid* at 138-139.

<sup>1003</sup> *ibid* at 139; L.Fox 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (2002) 29(4) *Journal of Law and Society* 580, at 594.

earlier, section 1(1) of the Prevention of Crime Act 1953 provides that, “*any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence*”.<sup>1004</sup> Similarly, section 139 of The Criminal Justice Act 1988 provides a separate provision for the prohibition of the carrying of articles with blades or points in any public place, this time without ‘good reason or lawful authority’.<sup>1005</sup> It can be argued therefore, that the same articles can be considered lawful or unlawful depending on the location at which they are possessed.<sup>1006</sup> This is logical in that articles are normally created and designed to serve a particular function, (i.e. the kitchen knife, garden tools and DIY tools), and it would be strange to prohibit their possession in their place of use to perform their natural functions. Therefore, such articles will be reasonable to possess in the home, or workplace, but not out of their context of normal use, and not in public places. Such articles are easily accessible when attacks occur in the home, and their use in self-defence in such situations will be acceptable.

This is another way in which self-defence in the home differs from self-defence in a public place. Not only are items that may be used to assist a defence more accessible and useable in the home, but the legal implications of having such articles available and acting with their aid is far less serious. Important considerations in cases involving weapons will be the way in which force was applied, the type of weapon that was used, and the existence of pre-meditated force. These factors represent the public interest, which could affect the plea of self-defence. Particularly dangerous weapons will need careful consideration, as will the level of unexpectedness of the attack and defence. If an individual has planned one’s response and armed oneself accordingly, that could be a determining factor. Case law has declared that

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<sup>1004</sup> The Prevention of Crime Act 1953, section 1(1).

<sup>1005</sup> Section 139 of the Criminal Justice Act 1988 - ‘(1) *Subject to subsections (4) and (5) below, any person who has an article to which this section applies with him in a public place shall be guilty of an offence. (2) Subject to subsection (3) below, this section applies to any article which has a blade or is sharply pointed except a folding pocketknife. (3) This section applies to a folding pocketknife if the cutting edge of its blade exceeds 3 inches. (4) It shall be a defence for a person charged with an offence under this section to prove that he had good reason or lawful authority for having the article with him in a public place. (5) Without prejudice to the generality of subsection (4) above, it shall be a defence for a person charged with an offence under this section to prove that he had the article with him— (a) for use at work; (b) for religious reasons; or (c) as part of any national costume*’.

<sup>1006</sup> The law regarding weapons and the social context for their possession and use was explored in Chapter 3.



*‘it was always an aggravating feature of any case involving injury or death that the injury or death had resulted from the use of a knife or any other weapon ... The court would repeat that anyone who went into a public place armed with a knife or any other weapon and used it to kill or to cause injury must anticipate condign punishment’.*<sup>1007</sup>

Therefore, it is a serious offence and the punishment will reflect this. The use of a weapon is clearly always an influential consideration. The condemnation of carrying and possessing a dangerous article in a public place is far worse than picking something up in the heat of the moment within the privacy of the home.

While the law firmly prohibits the carrying of ‘offensive weapons’ in public places, it takes a different approach to the possession of such articles in one’s own home, which is not a criminal offence.<sup>1008</sup> Location certainly impacts upon what is deemed reasonable in the circumstances. While it is permissible to use anything that comes to hand to secure self-protection, as a weapon of opportunity, the act of possessing and forearming oneself with an offensive weapon is a criminal offence. This undeniably means that the individual acting in self-defence in a public place is at a disadvantage compared with those in private dwellings.<sup>1009</sup> This is accentuated by the fact that the narrower test of self-defence requiring proportionality is applied in public places, while the use of a weapon in the home is subject to the more lenient standard permitting disproportionality.

#### **4.3.1 Interpreting public place in weapons offences**

Of particular interest and relevance are cases involving the possession of knives in which the issue of a public place was raised. In the case of *Roberts*,<sup>1010</sup> the appellant was arrested in his own garden and upon being searched was found to have a lock knife in his pocket. He was therefore charged with having a bladed article in a public place contrary to section 139 of the 1988 Act. Although the front gardens of properties are not usually considered places to which the public have access, the judge

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<sup>1007</sup> D.A.Thomas ‘Case Comment: *R v M* [2009] EWCA Crim 2544: Sentencing - Murder by Offenders Carrying Knives in Public - Minimum Term’ (2010) *Criminal Law Review* 243, at 244-245.

<sup>1008</sup> R.Manning *Justifiable Force: The Practical Guide to the Law of Self Defence*, *op cit* fn 841 at 76.

<sup>1009</sup> E.Smith, *op cit* fn 996 at 125.

<sup>1010</sup> *R v Roberts (Leroy Lloyd)* [2003] EWCA Crim 2753.

considered the particular garden in question to be a public place because, ‘*a public place was not merely land to which the public was permitted access but might also include land adjacent to areas where the public had access, provided that the harm against which the section was designed to provide protection could still be inflicted from such a place*’.<sup>1011</sup> This decision was considered to be wrong by the appeal court, as such a construction of a public place was far too wide an interpretation and would be difficult to enforce. The decision was indeed unfair, as Roberts was within the contours of his home at the time. It would be different if, for example, he had left the garden and was walking down the street away from his house at the time of his arrest.<sup>1012</sup>

This is reflected in the case of *Harriot*,<sup>1013</sup> which involved the possession of two knives in the forecourt of a bail hostel where the defendant lived. It was held that despite there being no signs restricting public access to the area, it remained a private place and thus could not be considered a public place for the purposes of the 1988 Act. This seems reasonable. However, questions could be asked over where the line should be drawn in apartment blocks or flats. Would the limit be the resident’s own flat, or would any part of the building be considered as a private space? These buildings are commonly gated communities, allowing access only to those who dwell there. However, the communal areas, such as stairways, may be viewed differently. The dangers of one resident carrying a weapon in such areas are comparable to the same situation in a public place, as all the other residents could be affected.

While it may be useful to note the requirements in relation to parts of a building for the purposes of burglary here,<sup>1014</sup> it is difficult to extend its interpretation within this context. The term ‘part of a building’ has been constructed as encompassing all areas to which there is no general access.<sup>1015</sup> This could mean that the communal areas fall under this scope, and are therefore private areas, where the defendant may feel permitted to carry a weapon. It is arguable that these areas should in fact be regarded

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<sup>1011</sup> C.Barsby & A.Ashworth ‘Case Comment: *R v Roberts*: Having a Bladed Article in a Public Place: Criminal Justice Act 1988 s.139 (1), (7)’ (2004) *Criminal Law Review* 141, at 141.

<sup>1012</sup> However, it is worth noting here that the householder defence does not extend to gardens, as the defence must occur within a building or part of a building. This was discussed in section 4.1.1.

<sup>1013</sup> *Harriot v DPP* [2005] EWHC 965.

<sup>1014</sup> Theft Act 1968, section 9.

<sup>1015</sup> *R v Walkington* [1979] 2 All ER 716, involving an area behind a counter within a department store.

as public areas, as they are places in which persons other than the defendant may be affected negatively by the presence of a weapon. It is a problematic example, as apartment blocks requiring codes or keys for access possess an element of privacy without being truly private, as several individuals share them.

What are the reasons for the differences relating to what is regarded as offensive weapons in the public and private domain? While the possession of such articles in public is clearly unlawful, their possession and use in private spaces may be entirely lawful and permissible. What is the varying element in these locations? Why is there only a mention of a public place in the legislation – is it never an offence if it occurs in the home? Is it perhaps due to the different purpose of the article? It has been designed for use in the home, in which case it is not created with the intention that it comes into regular contact with the public. For example, the possession of a kitchen knife in public would cause concern, whereas if it is used in self-defence in the home, the action will be much easier to explain, accept and defend. Perhaps it is due to the overall level of harm that may be caused, that the same action is viewed completely differently depending on the space in which it occurs.<sup>1016</sup> While a stab inflicts the same harm on an individual regardless of its location, a stabbing incident in a public place may involve more individuals, and thus produce more harm overall. What exactly is it about the home that sets it apart from a public place and provides the homeowner with extensive liberty that would not be accepted in a public place? This is a challenging yet important question. The following section as well as the substance of Chapter 5 will attempt to address it.

#### **4.3.2 The private place approach**

The onus of proof is much higher when a weapon is carried in the public sphere, than when it is used in a person's home. This is evident in the fact that in many cases where a weapon has been used against an intruder or burglar, the defender was either acquitted<sup>1017</sup> or was not prosecuted.<sup>1018</sup> This was the outcome following an incident in

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<sup>1016</sup> The issue of the potential societal harm that may be caused by offensive weapons possession was discussed in section 3.2.4.

<sup>1017</sup> M. Jefferson 'Householders and the Use of Force against Intruders' (2005) 69 *Journal of Criminal Law* 405, at 407-408.

<sup>1018</sup> A. Ashworth *Principles of Criminal Law*, *op cit* fn 705 at 122.

Manchester in July 2011. Peter Flanagan stabbed a man who had broken into his home as part of a gang, leading to the intruder's death. His actions had been taken in the course of lawful self-defence as it was deemed that the force he had used was reasonable, and therefore he was not prosecuted.<sup>1019</sup> The intruder was armed with a machete, and therefore presented grave danger to the homeowner, and justified his use of lethal force. Lanham states that there is no need '*to insist on imminence in the case of ordinary household goods. Possessing them for self-defence on private premises would normally not present a danger which outweighed the interests of effective self-defence*'.<sup>1020</sup> However, it is interesting to note an incident involving TV presenter and former musician Myleene Klass, who spotted intruders in her garden and waved a knife at them through the windows of her home to frighten them away. She received a warning from the police for doing so.<sup>1021</sup> Her actions seem to be in accordance with the law, and this case may be an example of an overly cautious approach by the police. Usually, possession in the home is acceptable, while outside the confines of the home any weapon carried will attract a need for greater proof of the imminence of harm to render the possession reasonable.

Sangero notes that the home is afforded a privileged status in this respect because '*the invasion of a person's home constitutes a severe intrusion into his living space and in itself harms his autonomy*',<sup>1022</sup> and as Fletcher notes, an intrusion in one's home creates a '*presumption of mortal danger to the homeowner*'.<sup>1023</sup> This principle has always been accepted, but the modern justification has moved away from the emotive explanation that the home is one's castle and fortress,<sup>1024</sup> and focuses on the danger and fear that confronts people when someone breaks into their home.<sup>1025</sup> It is the reasonable fear that one experiences when faced with intruders in the home that renders resort to force against them lawful, as, although burglars may not intend on harming the homeowner, '*there is a chance that they will and no certainty that they*

<sup>1019</sup> H.Carter 'Man who Killed Burglar will not be Charged', (*The Guardian*, 23 July 2011), at 17.

<sup>1020</sup> D.Lanham, *op cit* fn 710 at 92.

<sup>1021</sup> *Daily Express*, 'Debate: was Myleene Klass Right to Defend Herself', (12 Jan 2010), <<http://www.express.co.uk/posts/view/151310/DEBATE-Was-Myleene-Klass-right-to-defend-herself->> accessed on 03/07/11.

<sup>1022</sup> B.Sangero *Self-Defence in Criminal Law*, *op cit* fn 73 at 266.

<sup>1023</sup> G.P.Fletcher 'Punishment and Self-Defense' (1989) 8(2) *Law and Philosophy* 201, at 203.

<sup>1024</sup> The notion of the home as one's castle and fortress will be discussed in Chapter 5, in section 5.1.3 on castle doctrine.

<sup>1025</sup> B.Sangero *Self-Defence in Criminal Law*, *op cit* fn 73 at 266-267.

won't'.<sup>1026</sup> This idea of the uncertainty of the aggressor's intentions will be revisited and further developed in Chapter 5.

Despite the emphasis on public places in the legislation, as it happens, many of the householder cases that have arisen indeed involved the use of dangerous weapons in self-defence. This reflects the discrimination based on location that exists in the law regarding weapons. In September 2012, Andy and Tracey Ferrie were arrested on suspicion of causing grievous bodily harm after firing a legally held shotgun at intruders during a break-in at their farm, injuring two of the intruders. The case was not taken further as the CPS decided that it was clearly a matter of reasonable self-defence. The householders were faced with a threatening and frightening intrusion, and only acted according to what they thought was necessary in the circumstances.<sup>1027</sup> This was different to the well-known case of Anthony Martin, whose actions did not constitute self-defence as they were excessive, and he had also used an illegally held shotgun to shoot the intruders.<sup>1028</sup>

#### **4.3.3 The infamous case of Anthony Martin**

Arguably one of the best known cases in this area, not a self-defence case strictly speaking, is that of Anthony Martin, the Norfolk farmer who shot two burglars on his property, killing one and injuring the other. Morris claims that during the course of his trial, the attention the case received '*turned the Norfolk farmer into something approaching a folk hero*'.<sup>1029</sup> His case for self-defence failed because the jury considered the fatal shooting of sixteen-year-old Freddie Barras, and intentional wounding of Brendan Fearon to be excessive force.<sup>1030</sup> He was initially incarcerated for murder, but his conviction was later reduced to manslaughter by way of diminished responsibility. The reason for this was that he suffered from a paranoid personality disorder, which made him susceptible to viewing circumstances far more seriously than other people would, and he was therefore not fully responsible for the

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<sup>1026</sup> T.Kasachkoff, *op cit* fn 53 at 512.

<sup>1027</sup> See S.Lipscombe *Householders and the Criminal Law of Self-defence*, *op cit* fn 987 at 12; and I.Dobinson & E.Elliott, *op cit* fn 846 at 85.

<sup>1028</sup> *R v Martin*, *op cit* fn 59.

<sup>1029</sup> S.Morris 'The Killer Who Won a Nation's Sympathy', *op cit* fn 879.

<sup>1030</sup> *R v Martin*, *op cit* fn 59.

actions he took.<sup>1031</sup> Additionally, he had been victimised on several previous occasions, and had suffered repeated attacks, intrusions and thefts on his property. Although he had reported these to the police he had not received any resolution or adequate protection. He was therefore reported to have taken matters into his own hands, and had taken to sleeping fully clothed with his illegally held shotgun by his side.<sup>1032</sup>

This case demonstrates the importance of examining the principles of self-defence on a case-by-case basis.<sup>1033</sup> A number of things weighed against Martin's plea of self-defence, eventually leading the court to decide that he had acted beyond the scope of the defence. The nature of the weapon, the circumstances, and the manner in which it was used were problematic. The fact that his firearms certificate had been revoked, following an incident where he had shot at a car, meant the possession was unlawful, and the use unreasonable. The Lord Chief Justice at the time, Lord Woolf, delivered the court's judgement and said '*we must make it clear that an extremely dangerous weapon cannot be used in the manner in which it was used by Mr Martin that night*'.<sup>1034</sup> It was also problematic that Martin had shot the intruders when they did not directly threaten his safety and they were unaware of his presence, which was not a proportionate response. He shot the teenager Fred Barras, in the back causing his death, and injured the older of the two, thirty-three-year-old Brendan Fearon in his leg as he fled.<sup>1035</sup> Adding to these aggravating features, there was also an issue in terms of where exactly Martin was standing at the time of the shooting, whether he was on the ground floor with the burglars or whether he had pursued them down the stairs, as the latter was inconsistent with a situation of self-defence. The jury had felt that he had acted in anger, and accordingly found him guilty of the charges.<sup>1036</sup> The public perception of the case demonstrates unawareness of the intricacies of the defence and the operation of the law in this particular instance. This leads to assumptions that the

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<sup>1031</sup> *ibid*, at 16 – the court held that while evidence of the physical characteristics of the defendant might be considered by the jury in relation to self-defence, it was not appropriate (except in exceptional circumstances) to give regard to psychological conditions when assessing whether excessive force has been used.

<sup>1032</sup> BBC News, 'Tony Martin: Crime and Controversy', (13 June 2003), <<http://news.bbc.co.uk/go/pr/fr/-/1/hi/england/norfolk/3009769.stm>> (accessed on 20/06/13).

<sup>1033</sup> It is likely that the need for individual case examination will be more acute following the new test.

<sup>1034</sup> *R v Martin*, *op cit* fn 59 at 19.

<sup>1035</sup> BBC News, 'Tony Martin: Crime and Controversy', *op cit* fn 1032.

<sup>1036</sup> Morris, S. 'The Killer Who Won a Nation's Sympathy', *op cit* fn 972.

law of self-defence was unfair in his case, without understanding the reasons why self-defence was not a viable defence.<sup>1037</sup>

#### **4.3.4 Householders, intruders, and weapons - restricting revenge**

There have been many high profile cases involving the use of weapons against intruders. Another case that received extensive media attention was that of Munir and Tokeer Hussain.<sup>1038</sup> It must be explained that despite the widespread public outrage and disbelief that this attracted, it was not a case of self-defence. It is nevertheless, relevant to discussions of the law in this area. This was an exceptionally serious case in which the family had been tied up in their home, threatened, and told that they would be killed. The defendant arrived home at the scene and when the intruders fled, was assisted by his brother to chase after them. They caught one of the intruders and caused permanent brain damage by repeatedly hitting him with a cricket bat. Although they had been subjected to extreme provocation, this was not a case of self-defence, defence of one's family or the home, as the burglary and threat were over at the time the injuries were inflicted, and it had become a revenge attack.<sup>1039</sup> Due to the nature of the circumstances, a prosecution was required, but the sentences were reduced to reflect the principles of justice, the good character of the defendants, and the fact that they had been subjected to extreme provocation. The sentencing Judge expressed in the case that

*“Sadly, I have no doubt that my public duty requires me to impose immediate prison sentences of some length upon you. This is in order to reflect the serious consequences of your violent acts and intent, and to make it absolutely clear that, whatever the circumstances, persons, cannot take the law into their own hands, or carry out revenge attacks upon a person who has offended them”.*<sup>1040</sup>

This demonstrates that even articles not normally regarded as weapons, a cricket bat in this case, can become offensive weapons, and emphasises the significance of the

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<sup>1037</sup> The sense of injustice in such cases becomes a source of outrage in society. R.L.Lerner, *op cit* fn 256, at 333.

<sup>1038</sup> *R v Hussain and another* *op cit* fn 953.

<sup>1039</sup> *ibid*, at paragraph 3 of the judgment, The Lord Chief Justice at the time Lord Judge states ‘*The trial had nothing to do with the rights of the householder to defend himself or his family or his home. The burglary ... was over. The burglars had left. No one was in any danger from them*’.

<sup>1040</sup> *ibid*.

circumstances. Had the injuries been sustained while at the defendant's house, the outcome may have been different. A case of self-defence may have been arguable if this occurred at the family home as there would have been an imminent danger. However, it is likely that the force used would have been considered excessive.

Uniacke has discussed the nature of revenge demonstrating how it does not fit within the scope of self-defence. She says that

*'revenge is a type of retaliation which involves generally deliberate infliction of injury on another person ... the rationale of all revenge is that it is a requital, a payback of injury in kind ... arguably the motivation of all revenge ... is morally inappropriate in that it derives satisfaction from another person's suffering'.<sup>1041</sup>*

Looking at the Hussain case, the element of inflicting injury has gone beyond the aim of 'payback of injury in kind'. Not only was the action disproportionate in the circumstances as the initial attack had ceased, but also the level of harm inflicted was disproportionate to the attack that had taken place in Hussain's home. While the emotion that overpowered Hussain in the situation is understandable, and many are likely to feel the same level of explosive emotion at finding their family enduring such a situation, it remains immoral, as it acted upon a retributive intent that the aggressors must suffer. It is argued here that Uniacke's choice of word 'satisfaction' is slightly unsuitable in this context, and does not carry its usual meaning, as it is more a matter of seeking justice than of gaining some sort of pleasure from the action.<sup>1042</sup> The same was true in the case of Martin, as there was a sense that he was enacting retribution for the wrongs that he had suffered in the past.

#### **4.3.5 Cases where no prosecutions occurred**

Most cases of pure self-defence do not result in prosecutions or convictions. The cases that have resulted in the criminal convictions of householders injuring or killing intruders in their home, either do not involve circumstances of self-defence or are

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<sup>1041</sup> S.Uniacke 'Why is Revenge Wrong?' (2000) 34 *The Journal of Value Inquiry* 61, at 64.

<sup>1042</sup> *ibid* at 64. The case of Hussain illustrates that even people of a good nature, who do not usually harm others, can react in this way in the face of injustice and extreme circumstances. This element of emotion will be explored in Chapter 6.



clearly actions taken out of revenge or retaliation. One example where there was no prosecution was the case of Edwin Pitkin in 2008. Pitkin had stabbed a man who he believed was breaking into his home, only to discover it was his drunken neighbour mistakenly attempting to get into his own home. He was not prosecuted, as due to lack of evidence to prove unlawful killing there was no realistic prospect of conviction.<sup>1043</sup>

Another example that demonstrates the types of situations where no prosecutions will follow is that of Cecil Coley, a seventy-two-year-old man who was faced with four armed intruders in his florist shop in Manchester in 2011.<sup>1044</sup> He struck out at the intruders with a knife that was on the counter, killing one and injuring another. He was arrested initially on suspicion of murder, but was later released without charge. His was a clear case of self-defence involving extremely frightening circumstances, to which he had responded instinctively to protect himself while fearing for his life, using reasonable force as he considered necessary at the time.

Lipscombe also provides examples where prosecutions did occur, and one such case shows the obvious difference in the nature of the circumstances: a man had laid in wait for a burglar on his premises in Cheshire, and when he appeared had tied him up, beaten him, and then thrown him into a pit before setting him on fire. This is an extreme example, but clearly demonstrates unreasonable actions.<sup>1045</sup>

#### **4.4 Conclusion**

A number of important issues have been exposed in this chapter. The extended householder provision has been highlighted, and many problems have been identified. The arguments for the change in the law proclaimed the importance of increasing protection for householders, and providing greater power to act defensively. However,

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<sup>1043</sup> CPS News, 'CPS Advises No Charges Against Edwin Pitkin', (25 April 2008), <[https://www.cps.gov.uk/news/latest\\_news/130\\_08/](https://www.cps.gov.uk/news/latest_news/130_08/)> (accessed 19/07/13). This is an example of the success of the two-stage test employed by the CPS.

<sup>1044</sup> HC Deb 1 November 2011, vol 534, cols 857-864, <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm111101/debtext/111101-0004.htm> (accessed on 19/07/13).

<sup>1045</sup> Unreported case cited in S.Lipscombe *Householders and the Criminal Law of Self-defence*, *op cit* fn 987 at 10; and CPS, 'Homeowner's and Self-defence – DPP Issues Further Details of Cases', (13 January 2005), <[http://www.cps.gov.uk/news/latest\\_news/106\\_05/](http://www.cps.gov.uk/news/latest_news/106_05/)> (accessed on 15/10/14).

the arguments of the opposition demonstrate that a fine balance must be struck here, and that there is a need to discourage vigilantism. As Dicey states:

*‘The rule which fixes the limit of the right of self-help must, from the nature of things, be a compromise between the necessity, on the one hand, of allowing every citizen to maintain his rights against wrongdoers, and the necessity, on the other hand, of suppressing private warfare. Discourage self-help, and loyal subjects become the slaves of ruffians. Over-stimulate self-assertion, and for the arbitrament of the courts you substitute the decision of the sword or the revolver’.*<sup>1046</sup>

This quote perfectly describes the problematic nature of the debate. While it is important to ensure that innocent defenders are not criminalised, expanding the test was unnecessary.<sup>1047</sup> Reasonable force is a wide enough test to allow lawful instances of self-defence, and proportionality is a component of reasonableness.

While the householder who suffers a home intrusion has been wronged, and subject to an interference with his rights to autonomy and privacy, that in itself should not provide an automatic permission to determine the punishment one’s aggressor must endure. This is the domain of the criminal justice system, and not a task for the general public.<sup>1048</sup> The liberty to take reasonable actions in the circumstances to protect oneself, one’s family, and one’s property is a sufficient test in itself, as it is relative to the circumstances that the individual faces, and not some higher test of exceptional morality. The ‘reasonable force’ test is not too restrictive as it is considered on a case-by-case basis. Proportionality has always been an important part of self-defence, therefore, it is strange to suddenly allow disproportionate force. The change in the test to one of ‘grossly disproportionate force’, distorts the requirement of proportionality, potentially permitting far greater force than is necessary for effective self-defence, and is therefore at odds with the justifications behind the defence.

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<sup>1046</sup> A.V.Dicey *Law of the Constitution*, (8th ed., Macmillan & Co Ltd. London, 1915), at 489.

<sup>1047</sup> Indeed, Dobinson and Elliott state that ‘*the overriding feeling in relation to s.76 is that it is fundamentally flawed*’. I.Dobinson & E.Elliott, *op cit* fn 846 at 97.

<sup>1048</sup> Indeed, allowing householders to inflict disproportionate force on intruders appears to be a form of punishment. This may be compared with the harsh approach of capital punishment, where no redress for miscarriages of justice is possible, as here the sentencing takes place in private away from the trials of criminal law. Such an approach is undesirable and inappropriate as there the punishment does not reflect the gravity of the offence. Civilised society has moved away from capital punishment, and should therefore not be encouraging citizens to take matters into their own hands. Capital punishment was abolished in Great Britain through the Murder (Abolition of Death Penalty) Act 1965.

The test of self-defence should allow individuals the same level of defensive response regardless of the location. It would arguably be a better approach to allow the location element to be considered an aggravating factor when sentencing the aggressor for one's criminal actions, rather than creating a completely different standard of self-defence for householders.

## **Chapter 5: Location**

### **5. Introduction**

The law of self-defence in England and Wales draws direct and indirect distinctions between one's home and a public place. The vast differences in perceptions relating to these locations form the topic for discussion in this chapter. The main focus of the chapter is to explore the reasons why location matters. This requires an appreciation of factors that are unique to the home environment, that distinguish the home as a place meriting enhanced legal protection. For the most part, the chapter concentrates on self-defence, but the latter half also considers the relevance of location in respect of offensive weapons.

The first factor to be assessed is the status of the home or dwelling as a special institution, which demonstrates that individuals and societies attach significant value to the home. This influences opinions regarding what should be permissible acts of self-defence in these different locations. Historical notions and theories of home and dwelling will be explored to gain a deeper understanding of the special nature and sanctity of the home. This section will assess concepts of place, space and locality, and the attachments, meanings and identities which people form regarding specific places. The results of castle doctrine legislation will be examined as an example representing the sanctity of the home. Similarly, the right to autonomy and privacy may be perceived as being more pronounced in the home, and the level of fear felt by individuals also varies between public and private places. The crime of burglary will also be discussed as it epitomises the special nature of the home.

Secondly, there are many dimensions to the debate on location that may contribute to an increased understanding of the issue of location in self-defence. Examples will be discussed drawing upon the discipline of criminology to gain insight into fear of crime patterns, criminological spatial design; opportunism; and the use of public places by young people. These subjects offer an alternative perspective to the study of location, and to reasons why certain locations attract crime, as well as to methods employed to reduce crime. It will be argued that crime prevention strategies should be promoted ahead of more liberal self-defence laws.

## **5.1 Theories about the home**

The home as a place of dwelling is often described as a special type of property. It provides a defined space of privacy and exclusivity from the outside world. In this regard it is considered a unique and vital feature of the lives of all people. Fox states that every single individual lives somewhere, even if they have no permanent address, such as homeless people; they too must dwell in some place.<sup>1049</sup> As the example of the homeless demonstrates, the degrees to which this statement is true can vary. To the homeless this is evident in the sense of being located in a particular place rather than having a particular property to call home. The home itself is a distinct structure, and in order to assess this subject, it is necessary to attempt to discover what the defining feature of the home or dwelling is that sets it apart from other locations.

### **5.1.1 Dimensions of place and space**

The main question for this chapter is: why is self-defence in the home considered worthy of more protection than self-defence outside the home? Surely, the right to use reasonable force against aggressors should be protected wherever the defence is necessitated? When an individual attacks another, the victim should be permitted to protect himself, regardless of whether the attack occurs in the privacy of the home, or outside the house in a public place. While the home provides a space for people to exclude others from their own property,<sup>1050</sup> everyone has the same right to be in public places, which should be safe for everybody. A person assaulted in the street is attacked in a place which is accessible to all members of the public. It is argued here that the level of fear caused to the victim in this context could be the same as if the attack occurred in the home.

It is a matter of the individual's susceptibility to feeling frightened and their perception of fear. While it is possible that a greater proportion of people are fearful of home intrusions than they are of being attacked in the street, this is a very subjective consideration and it is not the place of the law to distinguish between these

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<sup>1049</sup> L.Fox 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?', *op cit* 1003 at 580.

<sup>1050</sup> This is one of the privileges of the home. K.Lambeth 'Dismantling the Purported Right to Kill in Defence of Property' (2001) 5 *Southern Cross University Law Review* 82, at 82.

scenarios.<sup>1051</sup> Attacks occurring in public are frightening as there is the potential for anyone at that location at that moment in time to have fallen a victim to the crime.<sup>1052</sup> The aggressor and the victim have equal status in terms of their permission to be there, whereas when intruders break into homes and properties, the position is completely different. Only the householder has the right to be there, the intruder has stepped beyond the line of permission and violates the householder's right to privacy. This is one possible explanation why self-defence is treated differently depending on its location. In order to explore the question and reach the roots of the difference between public and private areas, the concepts of space and place must be defined.

### **5.1.1(a) What is the meaning of 'space' and 'place'?**

First of all, it is necessary to consider a definition of the terms space and place. Although these are familiar and regularly used words, in the interests of clarity, their interpretation and application to a particular context must be explained. A brief definition is provided by Bottoms, who states that it is important to note that

*“‘place’ is not the same as ‘space’. The former concept refers to a geographical location, with fairly definite boundaries, within which people may meet, engage in various activities, etc. ‘Space’ is a much broader concept, but ... some social activities have become quite markedly spatially differentiated”.*<sup>1053</sup>

It is clear from this statement that place and space are different concepts. Place appears to be of fixed existence, and involves not only the physicality of being in a certain location but also includes the surrounding attachments, meanings and activities taking place there.<sup>1054</sup> Place is a location and determinate spot, whereas space is an expanse within which people live their lives and interact with one another. Space is therefore a more abstract entity, with undefined parameters.<sup>1055</sup> This is

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<sup>1051</sup> See section 5.1.5 for a discussion on the fear of home intrusions.

<sup>1052</sup> See page 184 for a discussion on Kleck's observation that part of the reason why attacks in public places are feared is that they are often committed by strangers. G.Kleck 'How Not to Study the Effect of Gun Levels on Violence Rates', *op cit* fn 906 at 80.

<sup>1053</sup> A.E.Bottoms 'Place, Space, Crime, and Disorder' in M.Maguire & R.Morgan (eds), *The Oxford Handbook of Criminology*, (4th edn, Oxford University Press, Oxford, 2007), at 529.

<sup>1054</sup> D.T.Herbert 'Crime and Place: an Introduction' in D.J.Evans & D.T.Herbert (eds), *The Geography of Crime*, (Routledge, London, 1989), at 3.

<sup>1055</sup> Y-F.Tuan 'Space and Place: Humanistic Conception' in S.Gale & G.Olsson (eds) *Philosophy in Geography*, (Springer, Netherlands, 1979), at 387-388.

demonstrated by Carrabine et al, who explain that *‘social life is conducted in social space ... Each space has its own internal rules of conduct ... Geographers argue that these spaces are not simply the ‘backdrop’ for our social interaction but that, by contrast, they help to shape the very nature of our social interactions’*.<sup>1056</sup> This is a useful explanation because it illustrates the broader perspective and relevance of space. The insights provided by geography, architecture, anthropology, environmental psychology and philosophy are of benefit to understand the difference that being in one’s home or in a public place has on perceptions of self-defence.

Regarding an analysis of place, Gieryn identified three necessary and sufficient features of place; the geographic location; the material form; and the investment with meaning and value.<sup>1057</sup> As to the first factor, the geographic location of place, he says *‘A place is a unique spot in the universe. Place is the distinction between here and there, and it is what allows people to appreciate near and far’*.<sup>1058</sup> He goes on to explain the second element of place, its material form as follows: *‘Place has physicality. Whether built or just come upon, artificial or natural, streets and doors or rocks and trees, place is stuff. It is a compilation of things or objects at some particular spot in the universe’*.<sup>1059</sup> The third element, the investment with meaning and value, explains the emotional attachment and personal recognition of a place, which provides its context: *‘without naming ... identification, or representation by ordinary people, a place is not a place ... A spot in the universe, with a gathering of physical stuff there, becomes a place only when it ensconces history or utopia, danger or security, identity or memory’*.<sup>1060</sup> Thus, people form opinions of places based on their experiences there, and this adds to the identity and understanding of the particular place. Applying these three concepts within the context of this research, one’s home is certainly to be regarded as a place, as are areas in the public domain that are accessible and used by the general public. It is likely that Geiryn’s third component is the most important to achieving an understanding of the distinction between one’s home and public places. This provides a conceptualisation of the meaning of place and space as applied in this thesis.

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<sup>1056</sup> E.Carrabine et al. *Criminology: a Sociological Introduction*, (2nd edn, Routledge, London, 2009), at 137.

<sup>1057</sup> T.F.Gieryn ‘A Space for Place in Sociology’ (2000) 26 *Annual Review of Sociology* 463, at 464.

<sup>1058</sup> *ibid.*

<sup>1059</sup> *ibid.*, at 465.

<sup>1060</sup> *ibid.*

Indeed, it is the concept of place that has most relevance to this research, with its defined and meaningful nature, as it can describe a location as a dwelling. Nevertheless, references to space, as an abstract concept, may also be appropriate in relation to public areas that are unlimited and devoid of meaning. It is interesting to discuss the value of a sense of place and its impact upon individual perceptions of places. Banks says that:

*‘The ways in which we describe and understand our position in the world rely heavily on our sense of not being someone but somewhere, thus we harbour strong feelings for place. Place has a double articulation; it acts as a physical context for everyday life, a material situation, but it is also imaginary and subjective - place is space with ‘felt value’, emotionalized space or space with feeling’.*<sup>1061</sup>

This portrayal demonstrates the power of place to produce a sense of belonging and reflects the strong attachment people feel towards their homes. This insight can perhaps explain the different attitudes towards self-defence, depending on whether it occurs in the home or in a public place. It appeals to our human instincts and emotions, and explains why we feel strong connections to our homes. Research by Abbott-Chapman and Robertson<sup>1062</sup> supports the idea that places develop our behaviour through implied standards of expected behaviour in different places. They provide the analogy that:

*‘place is space filled by people, practices, objects, and representations ... and places are interpreted, narrated, perceived, felt, understood and imagined so that meanings are not only experienced, they are learned through personal discovery ... the characteristics of home, the home’s surroundings, and the local neighbourhood ... sources of feelings of belonging’.*<sup>1063</sup>

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<sup>1061</sup> M.Banks ‘Spaces of (In)security: Media and Fear of Crime in a Local Context’ (2005) 1(2) *Crime Media Culture* 169, at 172.

<sup>1062</sup> J.Abbott-Chapman & M.Robertson ‘Adolescents’ Favourite Places: Redefining the Boundaries between Private and Public Space’ (2009) 12(4) *Space and Culture* 419.

<sup>1063</sup> *ibid* at 420.



This demonstrates how important places are to our personal development and sense of self, as we form a picture of our place in the world by identifying with different places.<sup>1064</sup>

This aspect of place identity will be discussed further shortly, but for now it is notable that private places by their very nature are full of meaning, identity, and feelings of attachment. Whether it is a place of work, or a home or dwelling, privacy is obviously an important feature of their existence. These experiences and associations within a place define its role and reflect its values to a person's life and self-identity. Part of the construction of places relies on the qualities and emotions that they attract, such as perceptions of ownership, control, security and familiarity. Private places are construed as a closed space for only those who are permitted to be there, they are not open to all, and are therefore a respected, personal zone.

Public places, in contrast, such as parks and promenades, are viewed as providing open permission to be present there. They are accessible and inviting to all. Such areas are a point of contact for many different people, all going about their own business, and living separate lives within the same spaces. Public places therefore, can be considered exciting and diverse, but also full of potential trouble and conflicts, as there is uncertainty over who will meet when and where. As a result, public places are often said to create more fear of crime than do private places. In particular, studies have shown that women experience higher rates of fearing crime than do men,<sup>1065</sup> especially the fear of stranger rape in public places,<sup>1066</sup> as '*public places are the sites for most stranger rape*'.<sup>1067</sup> Gardner notes the importance of an individual's appearance when conducting themselves in public places, as one's appearance can cause one to be perceived as an easy target for crime.

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<sup>1064</sup> L.Holloway & P.Hubbard *People and Place: The Extraordinary Geographies of Everyday Life*, (Pearson Education, Harlow, 2001), at 71.

<sup>1065</sup> See for example H.Hirtenlehner & S.Farrall 'Is the 'Shadow of Sexual Assault' Responsible for Women's Higher Fear of Burglary?' (2014) 54 *British Journal of Criminology* 1167; and J.Lane & K.A.Fox, *op cit* fn 565.

<sup>1066</sup> S.Britto 'Perceptually Contemporaneous Offenses' in F.Cullen & P.Wilcox (eds) *Encyclopedia of Criminological Theory*, (Vol 2, Sage Publications, London, 2010), at 702.

<sup>1067</sup> C.B.Gardner *op cit* fn 813 at 311-312.

The home's perceived protective barriers, the locks, the doors, the walls, are obviously absent in public places and consequently people can feel more vulnerable. Despite the fact that some people, such as gangs engaged in postcode wars, develop strong bonds of loyalty and commitment to particular places, everyone is entitled to be in public places.<sup>1068</sup> All people are equal while in public, and hence have no more control over those present or absent than anyone else. This is in contrast to the home, where individuals have control over inclusion and exclusion to the property. Public places therefore create enhanced fear of crime levels and individuals modify their behaviour and appearance accordingly.<sup>1069</sup> The degree of control or lack of control is a factor in the distinction between private and public places.

### **5.1.2 Attachment, meanings and identity**

Control is a factor connected to the sense of self that is formed in the home. Certain places function as a marker and formulator of identity, as they are a part of our everyday social existence and are inextricably linked to our lives. The association of a place as a home has significant emotional attachment. Home is where people feel most free and where they feel they can be 'themselves' in a familiar and comfortable private zone.<sup>1070</sup> The dwelling thus provides a sense of belonging, normality, and security. As Fox states: *"Home" is not an easy concept to pin down. Although the term is instantly familiar, and the physical reality of home is an important and omnipresent feature of our everyday lives, the legal conception of home has received surprisingly little attention*'.<sup>1071</sup> She refers to lay person terms of endearment towards the home such as 'a man's home is his castle'<sup>1072</sup> and 'there's no place like home', but claims that a legal definition is not as easy to form, as home is a subjective matter and is not capable of a precise quantification.<sup>1073</sup> This demonstrates the unique status of the home, and the reason why it is perceived differently from public places. Saunders and Williams refer to the home as *'one of the most basic institutions in contemporary*

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<sup>1068</sup> *ibid* at 315.

<sup>1069</sup> See page 228 for a discussion on different behaviour standards according to location.

<sup>1070</sup> L.Cuba & D.Hummon 'A Place to Call Home: Identification with Dwelling, Community, and Region' (1993) 34(1) *The Sociological Quarterly* 111, at 112-113.

<sup>1071</sup> L.Fox 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?', *op cit* 1003 at 580.

<sup>1072</sup> This phrase is attributable to Sir Edward Coke in *Semayne's Case* (1604) 5 Co Rep 91a; (1604) 77 ER 194.

<sup>1073</sup> L.Fox 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?', *op cit* 1003 at 580.

*western societies*'.<sup>1074</sup> Because of the personal nature of one's attachment to one's home, such sentiments are possibly trivialised and are therefore not considered adequate to form a legal concept. However, it appears that the incentive behind calls for a change in the test of self-defence, to extend the law evermore in favour of homeowners appears to be fuelled by emotional motives.<sup>1075</sup> The claim that a 'man's home is his castle and fortress' would be insufficient by itself to provide a lawful justification for any harm that a homeowner inflicts on an intruder in his home.<sup>1076</sup> As noted in Chapter 4, this type of belief and reasoning appears to have supported the calls for tougher and clearer legislation on the matter, and the Government's decision to extend the test for householders.

The personal attachments that people form with places, the sensitive and emotive meanings that they cultivate, and the identities that are facilitated in different locations are important to an understanding of the public/private debate. The home forms a bubble-like surrounding, in which a person is separated from his public life.<sup>1077</sup> This clearly explains the strong sentiments expressed by homeowners when they are confronted with an intruder in their home.

Gunter has found that certain aspects are of particular relevance to one's formation of feelings of attachment, security, and sense of belonging to a place. These are the length of time one has lived there, whether they were born there, and their family connection to the place. These all contribute to the creation of a sense of community, of a network of friends and family, and a sense of connection, which have a positive impact on the feeling of security that is experienced within the home and local area.<sup>1078</sup> This demonstrates that the sentiments regarding the home are interconnected with the broader area in which it is located. Taylor noted that while some neighbourhoods possess this sense of connectivity, with residents contributing to the

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<sup>1074</sup> P.Saunders & P.Williams 'The Constitution of the Home: Towards a Research Agenda' (1988) 3(2) *Housing Studies* 81, at 81.

<sup>1075</sup> This was discussed in greater detail earlier in Chapter 4.

<sup>1076</sup> The position is slightly wider than simply the householder against an intruder, as other individuals within the home (not necessarily the householder) are also included under the enhanced protection. For example, this could be family members or employees, such as child minders.

<sup>1077</sup> P.Townsend 'Gendered Space? An exploration of the Gendered Meaning and Experience of 'Home' in Contemporary British Society' (2000) 3(1) *Gender and Home Forum* 40, <<http://research.ncl.ac.uk/forum/v3i1/gendered%20space.pdf>> (accessed on 10/07/13), at 41.

<sup>1078</sup> A.Gunter 'Growing up Bad: Black Youth, 'Road' Culture and Badness in an East London Neighbourhood' (2008) 4(3) *Crime Media Culture* 349, at 353.

community life and collective nature of the area, in others, people keep to themselves and do not interact with their neighbours, leading to a weakening sense of security, stability and familiarity.<sup>1079</sup> The relevance of the home environment and location, particularly the surrounding neighbourhood, is significant to one's 'personal and social identity'.<sup>1080</sup> The home within its wider community is far from a mere physical structure or place to live, it is a symbol of stability and its infringement can have devastating consequences. For example, for victims of burglary, these positive associations and attachments are damaged, requiring a long time to be regained and repaired.<sup>1081</sup> This is a separate discussion, yet contributes towards the general perception and graver legal approach to self-defence in home invasions, than other cases of the defence.<sup>1082</sup>

Gieryn's view on the impact of location on behaviour is persuasive: '*Place is imbricated in moral judgements and deviant practices as well. Conduct appropriate backstage is often not permissible out front ... Constructions of behaviour, appearances, or even people as deviant depend upon where they happen*'.<sup>1083</sup> It is a truism, that people act differently in public than they do in private, and that there are unwritten codes of acceptable standards of behaviour when in a public place. This is not the case in a person's home where they are removed from outside judgement, and can freely express their idiosyncrasies.<sup>1084</sup> This provides an additional reason why public places can be frightening, as there are expected standards of behaviour, and when these are broken, it can cause people to feel uneasy and fearful. This is another way in which the home and local community provide security, because there is a familiarity and stability in what occurs there.

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<sup>1079</sup> R.B.Taylor 'Neighborhood Responses to Disorder and Local Attachments: The Systemic Model of Attachment, Social Disorganization, and Neighborhood Use Value' (1996) 11(1) *Sociological Forum* 41, at 42.

<sup>1080</sup> *ibid*, at 45.

<sup>1081</sup> T.F.Gieryn 'A Space for Place in Sociology', *op cit* fn 1057 at 482.

<sup>1082</sup> The study of the effects of burglaries on victims is beyond the scope of the present research. However, studies have found that individuals affected by such crimes, as well as those living in neighbourhoods where the sense of security has been lost, appear to modify their behaviour accordingly. For example, by avoiding certain areas or forming community safety groups. See, P.G.Donnelly & T.J.Majka, 'Residents' Efforts at Neighborhood Stabilization: Facing the Challenges of Inner-City Neighborhoods' (1998) 13(2) *Sociological Forum* 189, at 189-190.

<sup>1083</sup> T.F.Gieryn 'A Space for Place in Sociology', *op cit* fn 1057 at 479.

<sup>1084</sup> P.Townsend 'Gendered Space?', *op cit* fn 1077 at 44.

The association of the home with security is a fundamental ingredient of the castle doctrine. This approach reflects the status of the home as a sanctuary,<sup>1085</sup> based on the traditional view of the home as an autonomous area for individuals.<sup>1086</sup> The theory behind the castle doctrine regards the home as possessing a form of sanctity, and a representation of the homeowner's last line of defence. Levin explains the impact of the 'no retreat in the home' rule: *'the home is ... distinguished from the public space, creating a dichotomy between the public and private spheres and the law that applies in each'*.<sup>1087</sup> This approach clearly attaches great importance and significance to the home, explaining that the somewhat more relaxed approach of the law, within the context of the home is due to the special sanctity of dwellings.

Dwellings are unique types of property which provide much more than their material value or physical structure, as they facilitate basic needs of rest, security and safety.<sup>1088</sup> Historical notions of the home are not based on a concrete structure, but rather on the meaning and representations of the building itself. It includes the emotional attachments to the property already mentioned,<sup>1089</sup> and therefore home cannot be described purely on its physical structure without accounting for these subjective values.

### **5.1.3 Castle doctrine**

'Castle doctrine' is an historical notion advancing the view that one's home is one's castle and fortress, a special area in which one is granted certain protections and immunities.<sup>1090</sup> This principle offers an explanation of the differing attitudes and approaches to public and private places. Castle doctrine is primarily influential in respect of the rule of retreat, providing an exception to general retreat requirements

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<sup>1085</sup> L.Holloway & P.Hubbard, *op cit* fn 1064 at 77.

<sup>1086</sup> P.Townsend 'Gendered Space?', *op cit* fn 1077 at 43.

<sup>1087</sup> B.Levin 'A Defensible Defense?: Reexamining Castle Doctrine Statutes' (2010) 47 *Harvard Journal on Legislation* 523, at 530.

<sup>1088</sup> B.Sangero *Self-Defence in Criminal Law*, *op cit* fn 73 at 266.

<sup>1089</sup> For example, as Fox notes: *'home is a place of self-expression ... home provides the spatial framework of the occupier's life, and through its familiarity can foster a sense of belonging ... to be at home means to know where you are'*. L.Fox 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?', *op cit* 1003 at 593.

<sup>1090</sup> B.Sangero *Self-Defence in Criminal Law*, *op cit* fn 73 at 267.

when self-defence occurs in the home,<sup>1091</sup> and also beyond the home.<sup>1092</sup> Traces of the castle doctrine are present within the law of England and Wales,<sup>1093</sup> but it is not expressly operative. A weak rule of retreat is applied, namely, that the availability of retreat is a consideration but not a decisive factor of reasonable force. This same standard is applicable to all instances of self-defence - it is not removed in the context of the home. However, it is possible that the change of test to allow 'grossly disproportionate force' to be used by householders will change this. It will certainly expand on what is considered reasonable in the circumstances, which could mean that the consideration of the availability of a retreat will be given less weight.

Other jurisdictions, such as some American States,<sup>1094</sup> have implemented express provision of castle doctrine. Although less prominent following the widespread removal of the duty to retreat,<sup>1095</sup> in states where an attempt to retreat has generally been required the home is an exception to this norm.<sup>1096</sup> Where an attack occurs in a private dwelling, there is no consideration of an attempt to retreat before responding with force.<sup>1097</sup> It was held in the US case of *People v Tomlins*<sup>1098</sup> that persons faced with an attack in their own home can stand their ground, as they are in their usual place of shelter and sanctuary, and therefore should not be required to flee.<sup>1099</sup>

Following the decision by the US Supreme Court in *Brown v United States*,<sup>1100</sup> which removed the duty to retreat,<sup>1101</sup> there is general acceptance of the no retreat rule.<sup>1102</sup>

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<sup>1091</sup> According to Fletcher, this reflects the privilege of personal autonomy. G.P.Fletcher *Rethinking Criminal Law*, *op cit* fn 70 at 868.

<sup>1092</sup> J.W.Bobo, *op cit* fn 167 at 351-352.

<sup>1093</sup> This doctrine is linked to the rule on retreat, which was examined in section 2.1.1(b) in Chapter 2.

<sup>1094</sup> See also a general reference to the legal position in South Africa on page 232.

<sup>1095</sup> See the following paragraph.

<sup>1096</sup> For example, this was previously the position in Alaska. B.Levin, *op cit* fn 1087 at 534. Many States, including Alaska have since extended the castle doctrine to remove the duty to retreat from all locations, not just the home. See National Urban League, Mayors Against Illegal Guns & VoteVets.org, *op cit* fn 197 at 10.

<sup>1097</sup> F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 83.

<sup>1098</sup> *People v Tomlins* 213 N.Y. 240, 107 NE 496, 497 (1914). It was expressed that "It is not now, and never has been the law that a man assailed in his own dwelling is bound to retreat .... Flight is for sanctuary and shelter, and shelter, if not sanctuary, is in the home. That there is, in such a situation, no duty to retreat is, we think, the settled law in the United States as in England". This case and quotation have been cited in several later cases, including *Piszczatoski v. Filko* 840 F. Supp. 2d 813 (2012), at 829.

<sup>1099</sup> F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 85.

<sup>1100</sup> *Brown v United States*, *op cit* fn 1.

<sup>1101</sup> See section 2.1.1(b) in Chapter 2 on the rule relating to retreat.

As already mentioned, for States that have introduced ‘stand your ground’ laws and removed the retreat rule, a presumption has been created that whenever an intruder has entered one’s dwelling, the householder will be justified in using force.<sup>1103</sup> According to Neyland, the presumption that force is reasonable places the burden on the aggressor as opposed to the victim, as should be the case.<sup>1104</sup> Nevertheless, he also acknowledges that there is a danger that the

*‘presumption directly conflicts with the principle that before the use of deadly force is justified, there must be an actual or threatened harm to the person. The presumption does so by automatically establishing the reasonable belief that the use of deadly force was necessary, even if it was not present in the situation’.*<sup>1105</sup>

This is also a danger present in the change of tests in the UK to allow anything up to ‘grossly disproportionate force’ in self-defence.

Another example is Texas, which widened its provision in 2007 to allow citizens the same level of protection outside the home as they had already been granted inside the home.<sup>1106</sup> In the interest of fairness, the castle doctrine was extended in this way to reflect the instinctive reactions and priorities of people during moments of necessity, such as protecting themselves and their families, without having to worry about being punished for their actions in the future. In order to ensure that the new law does not disregard the life of aggressors, it retains the reasonableness requirement.<sup>1107</sup>

In a way, the law of England and Wales has embraced the essence and sentiment of castle doctrine standard in permitting disproportionate force. However, it has done so only in the context of the home, and has not widened the net in terms of all general cases of self-defence. It remains to be seen whether in future the amendments will have paved the way for a broader general test for self-defence, and whether the same approach will eventually apply in all locations.

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<sup>1102</sup> B.Levin, *op cit* fn 1087 at 529-530. Many differences exist in provisions and applications across States – for further discussion, see National Urban League, Mayors Against Illegal Guns & VoteVets.org, *op cit* fn 197 at 11-21.

<sup>1103</sup> J.W.Bobo, *op cit* fn 167 at 361.

<sup>1104</sup> J.P.Neyland, *op cit* fn 196 at 736.

<sup>1105</sup> *ibid* at 732.

<sup>1106</sup> *ibid* at 720.

<sup>1107</sup> *ibid* at 748.

There are other examples of liberal jurisdictional approaches, for example, Miller compares the self-defence laws of the UK with those of South Africa. She refers in particular to the highly publicised case of Oscar Pistorius,<sup>1108</sup> who shot his girlfriend thinking that he was shooting an intruder in his home. Miller mentions that the South African approach has historically been more lenient than that of the UK in relation to the defence of property, considering that intruders must accept that there is a risk to their own lives when they break into another's home.<sup>1109</sup> This reflects a liberal castle doctrine and 'author of his own misfortune' approach. She argues that the recent changes made by the Crime and Courts Act 2013 have brought the UK's position closer to that applied in South Africa, by increasing the amount of force that may lawfully be used in self-defence in a place of residence.<sup>1110</sup> Indeed, this is a fair comparison, based on the householder provision.

A key difference between these countries is the crime rates, with South Africa experiencing far higher levels of violent home invasions than England and Wales.<sup>1111</sup> Indeed, it is curious that England and Wales should move to a comparable standard of self-defence as South Africa, when the cultural context is so different. Where the risks and dangers are far greater it is logical to have a stronger test, but it is debatable whether this is required in England and Wales. Miller asks the question '*do we really want to create a legal justice system where people are allowed to shoot dead someone who is only trying to steal their TV?*'<sup>1112</sup> This reflects the nature of the change that has been made to the law as it prioritises property over life, and demonstrates that the danger in the test is down to permitting disproportionate force, as this does not distinguish between different types of intruders. It does not enforce an appropriate

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<sup>1108</sup> This case attracted significant worldwide attention due to the fame of Oscar Pistorius, also known as 'the blade runner'. Much of the interest in the case was due to Pistorius' status as a four-time Paralympic champion, who made history at the 2012 Olympics in London by becoming the first amputee to compete at the Olympics.

<sup>1109</sup> S.Miller 'Grossly Disproportionate', *op cit* fn 12 at 299.

<sup>1110</sup> *ibid*, at 300.

<sup>1111</sup> See for example the following articles by the Institute for Security Studies: L.Lancaster 'Safe as Houses: what do we know about Home Robberies in South Africa?' (23 April 2013), <<http://www.issafrica.org/iss-today/safe-as-houses-what-do-we-know-about-home-robberies-in-south-africa>> (accessed on 15/10/14); C.Gould 'Why is Crime and Violence so High in South Africa?' (19 September 2014), <<http://www.issafrica.org/crimehub/news/why-is-crime-and-violence-so-high-in-south-africa>> (accessed on 15/10/14); and research by AfricaCheck, 'Factsheet: South Africa's Official Crime Statistics for 2013/2014', <<http://africacheck.org/factsheets/factsheet-south-africas-official-crime-statistics-for-201314/>> (accessed on 15/10/14).

<sup>1112</sup> S.Miller 'Grossly Disproportionate', *op cit* fn 12 at 300.



defence according to the level of harm or threat faced; it permits greater force than necessary without sufficient regard to the true nature of the attack. The test appears to permit the use of disproportionate force against all threats, covering aggressive burglars but also non-armed innocent intruders, such as children.<sup>1113</sup>

The sentiment behind arguments based on castle doctrine is strong. However, such arguments, on their own, should not form foundations for law reform without evidence of need.<sup>1114</sup> As Fox's proclaims, '*The danger of describing home as associated with affection and love, is that this style of argument is unlikely to resonate with lawyers*'.<sup>1115</sup> This alone should not be sufficient to establish the reasonableness of using force in self-defence in the home.<sup>1116</sup> Leverick rejects any claim of a 'no retreat rule' based on the castle doctrine alone as it disregards the aggressor's right to life.<sup>1117</sup> The requirement of retreat, whether as an absolute or weak rule, protects the preservation of life, and respects the principle of harm prevention.<sup>1118</sup> However, the sentimental approach places property rights at the top of the hierarchy of rights, valuing property interests more highly than life, by virtue of not requiring the attempt to retreat before using force in self-defence. The reason for this is that it does not necessarily require individuals to be protecting themselves; they can choose to respond even if the threat is only to the property.<sup>1119</sup>

#### **5.1.4 Autonomy and privacy**

The special treatment of the home could be based on the right to autonomy and privacy. Thus, this offers another possible explanation of the different approaches towards private and public places, and utilises a modern approach to address the imbalance between property and individual rights. The emphasis is shifted from the

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<sup>1113</sup> *ibid*, at 306.

<sup>1114</sup> Although, as already discussed in section 5.1.2, and previously in Chapter 4, the reasons behind the change of test for householders in the UK are questionable. The reasons are argued to have relied heavily on emotions and public opinion.

<sup>1115</sup> L.Fox 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?', *op cit* 1003 at 589.

<sup>1116</sup> It is problematic in the way it assumes only trespassers can cause suffering within the home. The position of self-defence against another family member of the home is currently unacceptable, and has been the subject of heated debate. For example, see see N.Wake, *op cit* fn 856 at 449 and 451.

<sup>1117</sup> F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 85.

<sup>1118</sup> B.Levin, *op cit* fn 1087 at 528.

<sup>1119</sup> The defence of property will be discussed below at 5.1.6. It is of course natural that during home invasions, the defender will not be able to appreciate that the threat posed is only to their property and not to themselves, and may indeed believe that they are acting in self-protection.

sanctity of the home, to rely more on acceptable principles of individual autonomy, (the right to be self-governed and self-determinate), and the fact that the dwelling is the ultimate place of safety and privacy for its residents. Home invasions constitute a severe infringement of another's living space, and such actions in themselves result in grave harms to autonomy.<sup>1120</sup>

These approaches support the different perspective and opinions regarding self-defence in the home. They demonstrate appreciation of the special nature of the home without being based solely upon emotive reasoning. They appeal instead to the field of human rights for support. Sangero states that modern arguments more commonly focus upon each individual's right to autonomy, and the fact that an invasion of one's home constitutes a serious breach, not only of the right to autonomy, but also of the right to privacy.<sup>1121</sup> Levin shares this view, and states that '*the autonomy and right to self-preservation of the home dweller make for an alternative, more compelling foundation*'.<sup>1122</sup> These identifiable rights provide stronger justifications for self-defence in the home, and the higher level of permissible self-defence, than relying on the sanctity of the dwelling alone as a justification.

While these claims may not be human rights *per se*, it has been asserted that '*protecting autonomy is one of the central benefits of law*',<sup>1123</sup> and that autonomy and privacy are 'intimately connected'.<sup>1124</sup> They can therefore be considered protected in recognised rights, such as Article 8 ECHR: '*everyone has the right to respect for his private and family life, his home and his correspondence*'.<sup>1125</sup> Comparisons may be drawn here with the field of health and social care and home evictions by local authorities,<sup>1126</sup> where it has been confirmed that autonomy and respect for the home is a protected right under Article 8.<sup>1127</sup> This demonstrates the importance ascribed to

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<sup>1120</sup> J.E.Stannard, 'Editorial: The Englishman's Castle' (2013) 2(1) *Journal of Civil Legal Science* 1, at 1.

<sup>1121</sup> B.Sangero *Self-Defence in Criminal Law*, *op cit* fn 73 at 267.

<sup>1122</sup> B.Levin, *op cit* fn 1087 at 538.

<sup>1123</sup> M.Sellers (ed) *Autonomy in the Law*, (Springer, The Netherlands, 2007), at 1.

<sup>1124</sup> *ibid* at 2.

<sup>1125</sup> Article 8, European Convention of Human Rights 1950.

<sup>1126</sup> *Connors v The United Kingdom* [2004] ECHR 223.

<sup>1127</sup> Equality Human Rights, 'Article 8: The Right to Respect for Private and Family Life, Home and Correspondence', (Human Rights Review, 2012), at 261-262, <[http://www.equalityhumanrights.com/sites/default/files/documents/humanrights/hrr\\_article\\_8.pdf](http://www.equalityhumanrights.com/sites/default/files/documents/humanrights/hrr_article_8.pdf)> (accessed on 05/01/15).

personal autonomy within the law,<sup>1128</sup> and the positive obligation on the state to limit potential breaches by criminalisation and regulation. While these rights within Article 8 explain conceptions about the home, it is another matter to explain the killing of an intruder in the home for violating these rights.<sup>1129</sup> However, this is not the claim made in relation to these rights - they are merely discussed here as a contribution to an understanding of the home.

Indeed, if a person should feel safe anywhere, it should certainly be in one's own home, as the home can be said to provide for and accommodate needs so basic as to render it an integral part of one's autonomy.<sup>1130</sup> Such was the approach taken by the Court of Appeal in the case of *R v Saw and others*<sup>1131</sup> where it was stated that '*There is a longstanding, almost intuitive, belief that our homes should be our castles. The concept suggests impregnability and defiance against intrusion*'.<sup>1132</sup> The courts have recognised and reflected the special nature of the home as a private sphere.

The nature of the home is undeniably private, as Saunders and Williams depict:

*'The interface between the home and this wider setting is a crucial boundary in social life. It is marked out physically – with fences, front doors, net curtains, privet hedges, spyholes, burglar alarms, gates and signs – and socially – by rules governing 'dropping in', by rituals such as dinner parties, by reserved regions such as the 'front room' where 'guests' and 'visitors' are entertained, by legal statutes governing rights of entry and exclusion (as in the search warrant or the meter reader's card), and by norms regulating uninvited intrusion (such as when to telephone). The outside of the house is used to represent both a barrier and a signifier to the world beyond of the values and social placement of the household within'.*<sup>1133</sup>

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<sup>1128</sup> M.Kremnitzer & K.Ghanayim, *op cit* fn 277 at 879.

<sup>1129</sup> Leverick has strongly rejected the suggestion that acting in protection of the right to privacy can justify taking an aggressor's life. F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 141.

<sup>1130</sup> *R v Brewster and others* [1998] 1 Cr App R (S) 181, per Lord Bingham CJ, '*Most people, perfectly legitimately, attach importance to the privacy and security of their own homes. That an intruder should break in or enter, for his own dishonest purposes, leaves the victim with a sense of violation and insecurity*'.

<sup>1131</sup> *R v Saw and others* [2009] EWCA Crim 1.

<sup>1132</sup> *ibid* at 6, per the then Lord Chief Justice of England and Wales, Lord Judge.

<sup>1133</sup> P.Saunders & P.Williams, *op cit* fn 1074 at 83-84.

The privacy of the home stands in contrast to the control of the state over individuals, and also the outside world, thus the home is a defining feature of autonomy and a statement of privacy.<sup>1134</sup>

The home is known not only for its security and right to privacy, but also for the familial relations that are conducted inside its confines,<sup>1135</sup> playing a crucial part in the development of individual identities.<sup>1136</sup> The home is a protective barrier for individuals and normally appears far safer than the outside world.<sup>1137</sup> Townsend explains that there is a distinct difference between the inside and the outside of the home, and that privacy is perhaps the greatest value ascribed to the home.<sup>1138</sup> This difference is based on the fact that only certain people are permitted entrance to the home, in contrast to public places where anyone can be present at any time. Uniacke demonstrates the importance of privacy by describing it as ‘*a basic human need*’,<sup>1139</sup> and her claim that ‘*the right to privacy is often argued for as a necessary condition for freedom and personal autonomy*’.<sup>1140</sup> This explains the different treatment of the home and public places, with regard to self-defence. The reasons are based on the home’s provision of autonomy and privacy, and the grave interference of these rights that occurs during home invasions.

#### **5.1.5 The ‘fear factor’ in home invasions**

Thus far, in considering what features distinguish the home or dwelling from other spaces, it is clear that the home has a strong sentimental, emotive, and individual function. It produces strong public opinion about its protection and defence due to the violation of autonomy and privacy that occurs when it is invaded. However, another possible reason why the home or dwelling is viewed differently and more privileged is the fear factor associated with home invasions. It is a rare and frightening prospect

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<sup>1134</sup> *ibid*, at 88.

<sup>1135</sup> J.L.Hafetz “‘A Man’s Home is his Castle?’ Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries’ (2001-2002) 8 *William & Mary Journal of Women and the Law* 175, at 198.

<sup>1136</sup> L.Holloway & P.Hubbard, *op cit* fn 1064 at 71.

<sup>1137</sup> P.Saunders & P.Williams, *op cit* fn 1074 at 89.

<sup>1138</sup> P.Townsend ‘Gendered Space?’, *op cit* fn 1077 at 42.

<sup>1139</sup> S.Uniacke ‘Privacy and the Right to Privacy’ (1977) *Bulletin of the Australian Society of Legal Philosophy* 1, at 2.

<sup>1140</sup> *ibid* at 17.

to be confronted by an intruder in one's own home.<sup>1141</sup> It is believed that one experiences a heightened level of fear when one's home is invaded,<sup>1142</sup> although it would be difficult to quantify the level of fear and compare it to that experienced in an attack in a public place.

There is a presumption that when an aggressor breaks into a dwelling, especially at night,<sup>1143</sup> the endangered residents will be fearful for their lives.<sup>1144</sup> For example, Leverick claims that '*there is something about a threat of theft that takes place in the home that is intrinsically more dangerous than a threat of theft outside the home*'.<sup>1145</sup> This presumption of immediate danger involved in a home intrusion could also be true of attacks occurring in public places. The intentions of the offender are unlikely to be clear and may cause the victim to fear for his life. What underlies such presumptions about danger? Is it perhaps the issue of restrictions of space? The feeling of being trapped in one's own home, the one place where the homeowner has exclusive control over decisions as to who may enter and who may not,<sup>1146</sup> by virtue of one's rights in the property? This is a potential explanation, as it may be argued that there are fewer escape routes available from one's home. Nevertheless, this would depend on the location of the attack in a public place, as similar restrictions or obstacles to retreat may also be present there. Therefore, it does not provide a complete explanation.

In attempting to understand the strong opinions that are commonly held on the public/private debate, the effect that intrusions have on feelings of home and dwelling is a significant consideration. Such invasions can be very negative as '*when home becomes a place of danger, the positive associations of home, as a place of safety, of security, of control over oneself and one's environment, become subverted, and the*

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<sup>1141</sup> Public concern about this frightening prospect is disproportionate to the reality of the situation. C.Wells & O.Quick Lacey, *Wells and Quick: Reconstructing Criminal Law: Text and Materials*, (4th edn, Cambridge University Press, New York, 2010), at 813.

<sup>1142</sup> F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 139.

<sup>1143</sup> The fear is augmented at night as individuals are less likely to be conscious, and the cover of darkness conceals the nature of the threat. D.J.Baker, *op cit* fn 466, at 730.

<sup>1144</sup> K.Lambeth, *op cit* fn 1050 at 105.

<sup>1145</sup> F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 139.

<sup>1146</sup> K.Baghai 'Privacy as a Human Right: A Sociological Theory' (2012) 46(5) *Sociology* 951, at 953.

*effect can be psychologically very damaging*'.<sup>1147</sup> This is a significant statement as it shows how much disruption home invasions can create.<sup>1148</sup> It is not merely the initial shock and fright when the attack is active, but the burden of recovering after such an experience and trying to conduct a normal life again, perhaps within the same house, which may no longer feel like a home. When emphasis is placed on the home as a structure of safety, familiarity and security, it implies that life outside the home is mysterious and dangerous, '*within the idea of home as a 'haven' is the implicit suggestion that the outside world is a place to be feared*'.<sup>1149</sup> It is perhaps the element of the fear of the unknown that defines these approaches to public/private life. Anything is possible outside on the streets, and this is beyond an individual's control. On the other hand, within the four walls of the home, the householder usually has, and expects to have, control over all entry to the house, therefore with a break-in, an increased level of threat is experienced. The infringement of this structure causes great offence.

Possibly, the heightened sense of fear experienced when a home has been invaded is also partly due to the possibility that the house will be targeted again and therefore no longer feels safe. Research has shown that '*a burglary event is a predictor of significantly elevated rates of burglary for properties within a range of up to 300-400 metres from a burgled home for 1-2 months following the initial event, and, that this is especially a feature of more affluent neighbourhoods*'.<sup>1150</sup> This certainly projects a deep feeling of unease and it would naturally take a long time for the homeowners to re-establish a sense of security in a victimised home. An instructive example is that of Vincent Cooke<sup>1151</sup> who had endured an aggravated burglary, eventually managing to defend himself against one of the intruders, which resulted in the intruder's death. Even though he and his family were not physically harmed in the incident, the fear and violence that they had been subjected to changed their lives dramatically. Although he saved himself and his family and was not charged with murder as he had

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<sup>1147</sup> L.Fox 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?', *op cit* 1003 at 593-594.

<sup>1148</sup> *R v Flack* [2013] EWCA Crim 115, per Mr Justice Saunders at 11. The court acknowledged in this case that one of the most damaging features of burglaries is the invasion of the home itself.

<sup>1149</sup> L.Fox 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?', *op cit* 1003 at 594.

<sup>1150</sup> S.D.Johnson & K.J.Bowers 'The Stability of Space-Time Clusters of Burglary' (2004) 44(1) *British Journal of Criminology* 55, at 55.

<sup>1151</sup> *ITV*, 'Tonight: in Self-defence', *op cit* fn 985.

acted in self-defence, he struggled to come to terms with the fact that he had taken a life. Following the incident, he suffered from anxiety and was reliant on daily medication. This was a clear case of fear for one's life, and for the life of one's family, but there is a separate issue when it is the property, and not a person, that is under threat.<sup>1152</sup>

#### **5.1.6 The defence of property**

The reasonableness of the degree of protective force used may be reliant on what exactly it seeks to protect. Responding with deadly force where it is merely the property that is threatened will not be reasonable.<sup>1153</sup> All individuals have a right to life as protected by Article 2 of the ECHR. As human life is valued above property,<sup>1154</sup> in situations where it is solely the defence of property that is concerned, a higher standard of reasonableness and proportionality will be required.

This involves a comparison of the harms that are at stake, namely, the harm that the defender would suffer and the defensive harm that he inflicts on the aggressor. Kadish has explored the difference between various crimes that may justify the use of force against those attempting to perpetrate them, and says that harms to property and home invasions are not comparable with harms to life.<sup>1155</sup> He argues that in such situations it is not acceptable to use deadly force against one's aggressor. This view is also held by Leverick and Sangero,<sup>1156</sup> and represents the appropriate approach in modern, civilised society. When considering interests that are comparable to causing the death of the aggressor, the prevention of rape is applicable as a serious crime against the person. However, the defence of property by a householder against an intruder is clearly not a comparable harm.<sup>1157</sup> The demand for increased protection within the

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<sup>1152</sup> This has already been touched upon at 5.1.3, where it was demonstrated that the sentimental approach of the castle doctrine, is insufficient on its own to justify not requiring a safe retreat.

<sup>1153</sup> Different societies and jurisdictions have differing approaches and views regarding the reasonableness of killing in defence of property. See B.Sangero *Self-Defence in Criminal Law op cit* fn 73 at 252; S.Yeo 'African Approaches to Killing in Defence of Property' (2008) 41 *Comparative and International Law Journal of Southern Africa* 339, at 339; S.Yeo 'Killing in Defence of Property' (2010) 36(2) *Commonwealth Law Bulletin* 281, at 281.

<sup>1154</sup> K.Lambeth, *op cit* fn 1050 at 82; and F.Leverick *Killing in Self-defence, op cit* fn 8 at 142.

<sup>1155</sup> S.H.Kadish, *op cit* fn 180 at 888.

<sup>1156</sup> F.Leverick *Killing in Self-defence, op cit* fn 8 at 142; B.Sangero *Self-Defence in Criminal Law, op cit* fn 73 at 272.

<sup>1157</sup> S.H.Kadish, *op cit* fn 180 at 888.

home is a ‘*reflection of the autonomy principle, which extends the right to resist aggression broadly to cover threats to the personality of the victim ... the moral claim of the person to autonomy over his life*’.<sup>1158</sup> It is contended here, that the amendment to the law changing the test of self-defence to one of disproportionality<sup>1159</sup> may have pushed the law too far in the direction of the autonomy principle, diminishing the requirement of proportionality.

This could be a dangerous development that could potentially infringe the European Convention of Human Rights, as it disregards the offender’s right to life under Article 2.<sup>1160</sup> Although the offender is breaking the law, and as discussed previously, might cause his human rights to be temporarily forfeited as a result of his actions, this does not place him in a position that an unlimited degree of force can be used against him. Those who support the change to the law may argue that this is not the case, as a limit is placed upon the degree of force that may be used, namely, that of anything up to grossly disproportionate force. However, this greatly extends the previous test of reasonable force, so that the effectiveness of the limit as a barrier has been significantly weakened. Due to the importance of the sanctity of life principle, the use of force against any individual, despite their personal actions, must be necessary and proportionate in order to reflect the pivotal principle of justice.<sup>1161</sup> Therefore, diluting the requirement of proportionality could be in discord with these fundamental principles,<sup>1162</sup> and disrupt the balancing of the competing rights of the defender and aggressor.<sup>1163</sup>

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<sup>1158</sup> *ibid.*

<sup>1159</sup> Conservatives, Speeches, 2012: Chris Grayling, *op cit* fn 923. As discussed during the previous chapter, this has now been enacted through the Crime and Courts Act 2013, within the context of householders only.

<sup>1160</sup> Although this matter has not yet been directly challenged in the courts, there is evidence to support this contention in the form of European case law. This potential incompatibility of the legal approach in England and Wales and Article 2 was discussed in Chapter 4, at 4.2.2(a). The disparity is based on the standards required for lawful self-defence. While in English and Welsh law an honest belief is sufficient, the European standard suggests the need for good reason or reasonable belief. Thus, England and Wales applies a lower standard, which following the amendments within the householder context, may have widened the gap even further.

<sup>1161</sup> Kim refers to the presence of both necessity and proportionality as the ‘paradigmatic’ instance of self-defence. J.Y.Kim ‘The Rhetoric of Self-Defense’ (2008) 13 *Berkeley Journal of Criminal Law* 261, at 265.

<sup>1162</sup> Alm’s arguments support this claim, as he highlights the need for proportionality when using force to prevent crime. D.Alm ‘Self-defense, Punishment and Forfeiture’ (2013) 32(2) *Criminal Justice Ethics* 91, at 100.

<sup>1163</sup> S.Yeo ‘Revisiting Necessity’, *op cit* fn 450 at 43.



A potential argument against this limitation upon the use of force is that a person who attacks property infringes the rights of the owner and in so doing should accept that there is an accompanying risk to his own life. This approach treats the aggressor as the author of his own misfortune.<sup>1164</sup> While this view is understandable, there is certainly some confusion between the defence of property, and the householder's right to defend oneself and one's family against intruders. These are distinct situations. It should be noted that there is also a separate statutory defence of property, included in section 5(2)(b) of the Criminal Damage Act 1971<sup>1165</sup> and it is not limited to residential homes; it also covers other property and possessions.<sup>1166</sup> However, to avoid confusion, it is emphasised here that this does not involve the use of force against another person in defence of property, but rather the causing of damage or destruction to another's property.

The misinterpretation of this distinction between defence of property<sup>1167</sup> and self-defence partly underlies the change of test to disproportionate force for householders. What needs to be clarified and emphasised is that where there is fear for the safety of oneself and others, self-defence will be permitted. In such cases, the circumstances permit a greater degree of force to be used than where the threat posed is merely to the property, and not to the individual. The pressure to provide enhanced protection to householders is driven by the presumption that any home intrusion poses a risk of physical harm. It is conceded that when an intruder enters property, it is likely that if the householder is home, he will fear for his life. Indeed, Lambeth explains that residential burglaries naturally generate a fear and risk of personal harm and that such situations are characteristic of self-defence as opposed to defence of property.<sup>1168</sup>

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<sup>1164</sup> See page 187 for an explanation of this term.

<sup>1165</sup> The subsection provides a lawful excuse in the following situation: '*if he destroyed or damaged or threatened to destroy or damage the property in question or, in the case of a charge of an offence under section 3 above, intended to use or cause or permit the use of something to destroy or damage it, in order to protect property belonging to himself or another or a right or interest in property which was or which he believed to be vested in himself or another, and at the time of the act or acts alleged to constitute the offence he believed — (i) that the property, right or interest was in immediate need of protection; and (ii) that the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances*'.

<sup>1166</sup> B.Sangero *Self-Defence in Criminal Law*, *op cit* fn 73 at 253.

<sup>1167</sup> In the sense that force is used by a defender against an intruder to protect his property.

<sup>1168</sup> K.Lambeth, *op cit* fn 1050 at 105.

Generally, providing the actions taken and the defensive force used are reasonably necessary and proportionate to the threat faced, no prosecution will follow for the offence committed.<sup>1169</sup> However, the exception to this general principle is that where a mere threat to property is faced, it will not be reasonable to use lethal force to repel it. There must be a degree of threat, or a perceived threat, to the defender or someone else's life before the aggressor's life may be taken.<sup>1170</sup> It remains to be seen whether this position will change with the introduction of section 148 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which specifically includes the defence of property within the defence of self-defence. Similarly, only time will tell what impact the new provision in the Crime and Courts Act 2013 will have on this aspect of the law, as it extends the limits of reasonable actions inside the home, and may affect the response to threats against property.

When discussing location and particularly what type of property is considered, the approach taken in the context of the home, may extend over other properties as well such as rented accommodation, flats or apartments, being a resident at a hotel, or even one's place of work or business premises. This is due to the fact that one is considered to be the occupier or can expect a certain degree of privacy, and therefore is granted a certain privilege over that space over other people.<sup>1171</sup> Thus, an intruder into such spaces will be violating the resident's rights, in the same way as an intruder into a home violates the rights of its inhabitants. This would include, for example, a babysitter or a guest inside the home. Therefore, it would transpire that anyone who has permission to be in that place at that time has the right to use defensive force against another who unlawfully invades without permission.<sup>1172</sup>

Nevertheless, the reality is not quite this straightforward. While it is true that people in such situations would have the right to defend themselves in a place they were lawfully permitted to be at the time, the standard of self-defence applying may be different based on their status. During the debate on the Crime and Courts Bill in

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<sup>1169</sup> As explained in Chapter 2.

<sup>1170</sup> This is similar to the position in relation to rape. In the case of *R v Olugboja* [1981] EWCA Crim 2, where although force was not used on the victim, she complied due to fear, and did not consent to sexual intercourse with the defendant.

<sup>1171</sup> B.Sangero *Self-Defence in Criminal Law* *op cit* fn 73 at 273; D.J.Baker, *op cit* fn 466, at 725.

<sup>1172</sup> As confirmed during discussions on the Crime and Courts Bill Deb, *op cit* fn 891, col 277. See Chapter 4, section 4.2.

2013, it was expressed that the higher protection afforded to householders and business keepers, does not apply to customers who are in the shop at the time in question.<sup>1173</sup> The extent of the action that may be taken is different depending on one's status in relation to the property. However, in contexts other than the customer/shopkeeper example, there certainly is a right to defend which is arguably based on the inside/outside dimension of the intrusion, rather than the home/non-home aspect. This means that anyone who has a right to be somewhere, for example at their own place of work, or a child minder at their employer's home, can lawfully defend themselves against unlawful intrusions from the outside. This applies due to the nature of facing an intrusion from the outside and is not based solely on an occurrence in one's home; it also applies to other properties that are not homes, such as businesses. This has arguably introduced an element of confusion and arbitrariness into the law, as it seems that the application of the new standard is inconsistent.

Thus, while the castle doctrine suggests that the home/non-home dimension is what justifies the action, there is also an emphasis on the inside/outside dimension. The law on burglary reflects this, in the importance ascribed to an intrusion from the outside to interfere with the rights of ownership and privacy on the inside, and is intertwined with the debate on self-defence and location.

### **5.1.7 Burglary**

The criminal law offence of burglary reflects the special nature of the home. It is necessary to explore the offence briefly, as this is the primary crime that will be committed when an individual breaks into another person's home. It is important to be aware of the specifications of the offence to gain an insight into the manner in which the law protects properties, and thus relates to the discussion on the location of self-defence.

Under the law of England and Wales, the relevant statutory provisions can be found in the Theft Act 1968. The provision of primary concern to the discussion of self-

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<sup>1173</sup> Again, as discussed by the Public Bill Committee, Crime and Courts Bill Deb, *op cit* fn 891, col 278. See section 4.2.

defence in the home and the crimes committed by the intruder is the statutory provision for burglary, which is found in section 9 of the Theft Act 1968:

*‘(1) A person is guilty of burglary if - (a) he enters any building or part of a building as a trespasser and with intent to commit any such offence as is mentioned in subsection (2) below; or (b) having entered into any building or part of a building as a trespasser he steals or attempts to steal anything in the building or that part of it or inflicts or attempts to inflict on any person therein any grievous bodily harm.  
(2) The offences referred to in subsection (1)(a) above are offences of stealing anything in the building or part of a building in question, of inflicting on any person therein any grievous bodily harm or raping any person therein, and of doing unlawful damage to the building or anything therein’.*<sup>1174</sup>

This is a fairly broad provision, safeguarding properties from any commission of crime therein, and protecting residents or owners from any harm that they may suffer.

The offence requires more than a mere trespass onto property, in other words, more than the unlawful presence without permission. It also requires the intention to commit a further crime therein. Suk explains this requirement:

*‘A person in his home had the right to be free from intrusion ... A prohibition on unlawful entry would completely address the concern to protect the home boundary from breach. But the additional specific intent requirement constructs the home as a space that should be especially free not only from intrusion, but from crime. The home is a spatial metaphor of private refuge from crime - a crime-free zone’.*<sup>1175</sup>

This offence epitomises the importance of the dwelling as a space in which the owner or resident takes control, a sphere of private governing where the issues of the outside sphere, such as crime, should not be present. Burglary has been categorised in some studies as a personal crime rather than a property crime, because if the residents are at

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<sup>1174</sup> The Theft Act 1968, section 9 - *‘(3) A person guilty of burglary shall on conviction on indictment be liable to imprisonment for a term not exceeding- (a) where the offence was committed in respect of a building or part of a building which is a dwelling, fourteen years; (b) in any other case, ten years. (4) References in subsection (1) and (2) above to a building, and the reference in subsection (3) above to a building which is a dwelling, shall apply also to an inhabited vehicle or vessel, and shall apply to any such vehicle or vessel at times when the person having a habitation in it is not there as well as at times when he is’.*

<sup>1175</sup> J.Suk ‘Criminal Law Comes Home’ (2006) 116(1) *The Yale Law Journal* 2, at 23.

home at the time, it may also entail direct harms to their person.<sup>1176</sup> It must be noted however, that the definition of burglary is not limited to dwellings and is phrased to include buildings and structures, and therefore ‘*it has often been noted that burglary is best understood not as a crime against property itself, but rather as a crime against a person’s “right of habitation”*’.<sup>1177</sup>

The law reflects the importance of property rights and supports the special nature of homes. It also highlights why private spaces require high levels of protection, as it responds to the assumption that an intrusion into the home carries significant risks to the resident, by requiring the intention to commit further crimes therein. It therefore contributes to the fear that is induced by home intrusions, as the residents will expect further harm to be caused. It may be said to provide support for the notion that a more generous test of self-defence should apply in such contexts.

Perhaps it is the types of offences and crimes involved that set public and private spaces apart. When a home has been invaded, it is relatively certain that the intruder will not only trespass but will also commit a burglary.<sup>1178</sup> While this may also entail the possibility of the commission of extra crimes within the home such as assault, serious identifiable crimes have already been positively committed by the very breaking and entering of the home, and the unlawful presence of the intruder within the dwelling of another. Indeed, studies have found that fear of burglary is directly related to the fear that it might cause physical harm.<sup>1179</sup> In contrast, when an attack necessitating the use of self-defence occurs in a public place the crimes involved can range from assault, theft (mugging), rape, ABH, and GBH - it could be any of these and the victim cannot be certain which, if any, of such offences will be committed against them.<sup>1180</sup> Therefore, when incidents occur in public places, unless a clear or fixed commission of a crime can be identified, there is greater uncertainty as to the seriousness of the wrong that the individual is using defensive force against. Perhaps, therefore, it is the added element of uncertainty and ambiguity that provides a crucial

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<sup>1176</sup> H.Hirtenlehner & S.Farrall, *op cit* fn 1065 at 1171.

<sup>1177</sup> J.Suk, *op cit* fn 1175 at 24-25.

<sup>1178</sup> E.Smith, *op cit* fn 996 at 139.

<sup>1179</sup> H.Hirtenlehner & S.Farrall, *op cit* fn 1065 at 1176.

<sup>1180</sup> These offences could also be committed during a home invasion, and it is true that the inhabitants will not know which crimes the intruder intends to commit. However, the difference is that at least one crime is clearly identifiable, namely, burglary.

distinction between these locations. As Nelkin notes, ‘*we rarely know exactly what a person’s intentions are or the strength of her commitment to a course of action. One (admittedly fallible) indicator is whether she succeeds or not*’.<sup>1181</sup> Although the aggressor’s intentions can never be truly obvious, it may be fair to say that when an attack occurs in a public place, the intentions are even less clear. In such a situation it is not clear which offence or crime is attempted, whereas with home invasions, there are clear indicators and proof of the commission of certain offences, as in the first place, one has intruded into the home of another.

Research conducted by Chang examined the incidence of burglary and where the crime is most likely to occur. It found that the types of properties most targeted are single houses and commercial buildings,<sup>1182</sup> and that burglary is more likely to occur in buildings adjacent to paths or alleys for cars and pedestrians.<sup>1183</sup> Thus it appears that certain risk factors are operative, which might drive people living within targeted areas to take increased measures to prepare for intrusions. Following the amendment in the standard for householders, this could increase the rate of householders who prepare for an incident of self-defence,<sup>1184</sup> which is fundamentally at odds with the role of defensive action. If the primary crime committed during intrusions is burglary, the usual punishment for that offence would be fourteen years in the case of dwellings, and ten years in other contexts.<sup>1185</sup> Accordingly, permitting the use of disproportionate force with fatal consequences, despite the fact that the individual may have essentially acted pre-emptively, (for example by ensuring the availability of weapons), would greatly exceed the level of punishment proscribed for the offence committed. Namely, the burglar’s punishment would be the loss of his life, as opposed to the incarceration period prescribed by law.

It may therefore be said that the law of burglary parallels the reasons behind the change to the law of self-defence. It clearly demonstrates that intrusions from the

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<sup>1181</sup> D.K.Nelkin ‘Moral Luck’ in E.N.Zalta (ed), *The Stanford Encyclopedia of Philosophy*, (Winter 2013 Edn, First published on 26 Jan 2004), <<http://plato.stanford.edu/archives/win2013/entries/moral-luck/>> (accessed on 16/01/14).

<sup>1182</sup> D.Chang, ‘Social Crime or Spatial Crime? Exploring the Effects of Social, Economical, and Spatial Factors on Burglary Rates’ (2011) 43:1 *Environment and Behaviour* 26, at 48.

<sup>1183</sup> *ibid*, at 39.

<sup>1184</sup> N.Wake, *op cit* fn 856 at 445. Wake claims that ‘*In light of the new law, ‘startled householders’ might become more inclined to intervene*’.

<sup>1185</sup> Section 9 (3) (a) and (b) Theft Act 1968.

outside deserve punishment because of the serious wrong that the householder suffers. It supports the basis for defensive action, namely to protect against any crimes committed within, providing the force is used against a trespasser.<sup>1186</sup> Despite similarities, the offence of burglary is broader than the self-defence standard for householders. The offence encompasses a wider category of buildings than the defence. This implies that when dealing with self-defence, the home/non-home element does have importance, because the extended test will primarily only be permissible in the former category.

While it is clear that emotive values have shaped the law in this area, there are many more elements that highlight and explain the differences between public and private spheres. The next section of this chapter draws upon the field of criminology to examine the breadth of the location dimension of this research. It is a component of not only the self-defence aspect of the research, but also the inquiry into weapons offences.

## **5.2 Understanding the law in context**

This section searches for a broader understanding of the concepts surrounding the public/private divide. First, the fear of crime level will be assessed. Secondly, criminological inputs on the design of environments, and the impact spatial design and opportunism can have on crime will be considered. Thirdly, the impact and views of young people who are unique in their use of public places will be evaluated, providing an insight into trends and patterns involving space. Finally, the theory of moral luck and its application will be deliberated.

### **5.2.1 Fear of crime**

The aim of this research to understand why self-defence in the home is given far more attention than self-defence in public places would be unattainable without

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<sup>1186</sup>This requirement has faced criticism as it is problematic for victims of domestic violence, as in such cases the danger is presented from within the home, and not by a trespasser. As mentioned in Chapter 1, the detailed consideration of the treatment of such cases within the law of self-defence is unfortunately beyond the scope of this thesis. However, for discussion on this particular issue, see N.Wake, *op cit* fn 856 at 449 and 451.

consideration of the field of criminology. There are many important inputs and insights to be gained from considering the approach and study of criminological theories. One factor which is influential in the different perceptions between public and private spaces is the fear of crime level. Fear of crime has already been touched upon in the previous section, and will be explored in greater depth in Chapter 6 when considering the influence of the media. It is discussed here to highlight another reason why location matters in the legal analysis relating to self-defence and offensive weapons.

Public perception and fear of crime can be shaped by official statistics, especially considering that such statistics can sometimes be misleading and confusing. Issues mainly arise from different levels and goals of policing, recording methods and the participation of the public in reporting crime.<sup>1187</sup> These variations can paint a mixed picture and lead some to believe that certain crimes are rife in their location, whereas in fact, it could be down to a decision to enforce proactive policing for that particular type of offence.<sup>1188</sup>

Despite the incidences of crime declining since the 1990s, public fear of crime has not reduced, and in particular anxiety mainly remains regarding offences occurring in public places. Bottoms reports that

*‘the most commonly identified ‘top signals’ are all disorderly events occurring in public space. Thus, perhaps, these kinds of incidents send a powerful signal to residents (in a way that residential burglaries do not) that ‘my area is out of control’ ... even quite minor incivilities in an area can, on occasion - and especially if persistent ... be perceived as major threats to local safety’.*<sup>1189</sup>

This is particularly relevant to the expansion of self-defence law in the home. It appears that a threat in the home is not the most prominent type of fear experienced by the public. The public is, in general, more concerned about matters occurring in public places. The concentration of law reform efforts on the home sphere alone is

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<sup>1187</sup> However, Fogg argues that this is not a real issue, as victimisation surveys such as the Crime Survey for England and Wales can fill in the gaps here, thus providing a broader more complete picture. A.Fogg ‘Crime is Falling. Now let’s Reduce Fear of Crime’, (*The Guardian*, 24 April 2013).

<sup>1188</sup> A.E.Bottoms ‘Place, Space, Crime, and Disorder’, *op cit* fn 1053 at 534-535.

<sup>1189</sup> *ibid*, at 550, 551, and 552.



therefore misguided. Instead of producing modifications to existing standards and tests within the home, what is needed, is a clarification of the application of self-defence across the board, in all locations, not only in particular scenarios.

Perhaps the media has a role to play in this fear of crime phenomena and particularly the anxiety reported over public space disorders. Offences occurring in public places, such as muggings, have been widely reported, presenting the opinion that crime is very prevalent in public places and that it occurs on a regular basis. Banks notes that there is a link between media reporting and individual fear of crime levels, '*it has been suggested that the media may be one of various stimuli that create 'geographies of fear', affecting our orientation to an use of public and private spaces*'.<sup>1190</sup> This will be examined in greater detail in the following chapter.

The use of public spaces and the adaptation of behaviours in such places has been analysed by Gardner.<sup>1191</sup> Her study focused on the advice that is often issued to women,<sup>1192</sup> which is simply not to go out at night on their own, and to always ensure that they have a companion to secure their safety in public. The study shows the extreme lengths that some women go to in order to feel safe. Precautions ranged from walking in the middle of the road, and dressing in a way that will not attract attention, to following a group of people, or pretending they are meeting someone, to leaving the television on at home when they leave, on a sports channel, and shouting a greeting to a pretend person as they approach the door on their way home.<sup>1193</sup> This suggests that there are many predators waiting around corners to pounce on unsuspecting lone women at night, and that there is an agreed consensus that women should take precautions to protect themselves from such dangers. Whilst this fear and reaction may initially seem like a bleak outlook, it can potentially produce positive outcomes. This occurs as the fearful individuals feel like they can take measures to prepare themselves for or to avoid danger. Modifying one's behaviour provides an

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<sup>1190</sup> M.Banks 'Spaces of (In)security: Media and Fear of Crime in a Local Context', *op cit* fn 1061 at 170.

<sup>1191</sup> C.B.Gardner, *op cit* fn 813.

<sup>1192</sup> The specific focus on women reflects the higher fears of crime among women than men. As an aside point, it is also interesting that age affects fear of crime, with the older and younger generations displaying the highest fear of crime levels. D.Hummelsheim et al. 'Social Insecurities and Fear of Crime: a Cross-national Study of the Impact of Welfare State Policies on Crime-related Anxieties' (2011) 27(3) *European Sociological Review* 327, at 334.

<sup>1193</sup> C.B.Gardner, *op cit* fn 813 at 316, 318, 319, 320.

element of control over the fear, and studies have found that one-quarter of people who reported feeling fearful of crime also took precautions to decrease their risk of becoming a victim, and confirmed that in doing so they felt that it increased their sense of safety.<sup>1194</sup>

Research by Gray et al<sup>1195</sup> questioned the responses provided to crime surveys that seek an insight into the level of fear of crime felt in a community. Their study suggested that the individual answers received from respondents are less influenced by their actual experiences, than by their general worry that they might be at risk of future victimisation.<sup>1196</sup> Thus, the results might say more about the individual personalities than the causal link between the crime rate and fear of crime,<sup>1197</sup> which appears to be only loosely correlated.<sup>1198</sup> Additionally, another aspect that may be more indicative and influential on the fear of crime experienced by individuals is the environment itself, with neglected neighbourhoods producing heightened fear of crime rates, as well as potentially impacting negatively on health and social well-being.<sup>1199</sup> It therefore appears that location and the environment are causal factors of relevance to the levels of fear of crime experienced by the public. This leads onto the next matter for exploration, namely, the criminological discussion about the links between the environment and crime.

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<sup>1194</sup> E.Gray J.Jackson & S.Farrall 'Feelings and Functions in the Fear of Crime' (2011) 51 *British Journal of Criminology* 75, at 77.

<sup>1195</sup> *ibid.*

<sup>1196</sup> *ibid.*, at 76-77.

<sup>1197</sup> I.Brunton-Smith & P.Sturgis 'Do Neighbourhoods Generate Fear of Crime? An Empirical Test Using the British Crime Survey' (2011) 49(2) *Criminology* 331, at 335 – '*many studies have found no significant association between fear and the level of crime, leading to speculation that fear of crime is, at least insofar as it is measured in surveys, an "irrational" response, unrelated to objective risks*'. This demonstrates that often those who feel fearful of crime have not witnessed or experienced a crime in person, therefore it is based on a subjective future fear, as opposed to an identifiable incident that triggers the emotion and concern.

<sup>1198</sup> T.Lorenc et al. 'Crime, Fear of Crime, Environment, and Mental Health and Wellbeing: Mapping Review of Theories and Causal Pathways' (2012) 18 *Health & Place* 757, at 762; and J.Ditton & D.Chadee 'People's Perception of their Likely Future Risk of Criminal Victimization' (2006) 46 *British Journal of Criminology* 505, at 505.

<sup>1199</sup> T.Lorenc et al. 'Fear of Crime and the Environment: Systematic Review of UK Qualitative Evidence' (2013) 13 *BMC Public Health* 496, at 1; D.Sethi et al (eds), *op cit* fn 495 at vi.

### 5.2.2 Environmental Criminology

The field of environmental criminology has ascribed to the environment a causal influence in the occurrence of crime.<sup>1200</sup> It covers a vast area, which considers the risks of victimisation present in specific places,<sup>1201</sup> opportunism, as well as concepts of territoriality and the defensibility of space as factors capable of preventing crime.<sup>1202</sup> Notably, neighbourhoods can be directly related to fear of crime levels and may lend themselves to certain criminal activity and trends in offending.<sup>1203</sup> Thus it is possible that a neighbourhood can affect and contribute to offending behaviour.<sup>1204</sup> In the same way that some people are more likely to commit crimes than others, some places possess a higher likelihood of becoming vulnerable to frequent incidents of crime.<sup>1205</sup>

The theory of environmental criminology is accompanied by the belief that people should feel that they own public space and share a responsibility for it, therefore creating a sense of place.<sup>1206</sup> This can act to curb crime due to societal or community control. This theory is beneficial to examine the locality of crime, and therefore defences such as self-defence, because crime can be, and often is, highly localised.<sup>1207</sup> This is true in relation to, for example, the weapons culture among some youths in certain localities.<sup>1208</sup> Location can become a crucial part of a group or gang's

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<sup>1200</sup> The environmental criminology theory has many different titles – 'urban sociology', 'ecology of crime', and 'socio-spatial criminology'. A.E.Bottoms 'Place, Space, Crime, and Disorder', *op cit* fn 1053 at 529.

<sup>1201</sup> J.Wartell & K.Gallagher 'Translating Environmental Criminology Theory into Crime Analysis Practice' (2012) 6(4) *Policing* 377, at 377. Environmental criminology is explained as an examination of opportunities for crimes based on the location at which they occur.

<sup>1202</sup> R.Wortley & L.Mazerolle 'Environmental Criminology and Crime Analysis: Situating the Theory, Analytic Approach and Application' in R.Wortley & L.Mazerolle (eds), *Environmental Criminology and Crime Analysis*, (Willan Publishing, Devon, 2008), at 1.

<sup>1203</sup> I.Brunton-Smith & P.Sturgis, *op cit* fn 1197 at 334.

<sup>1204</sup> A.A.Reid et al. 'Uncovering the Spatial Patterning of Crimes: A Criminal Movement Model (CriMM)' (2013) 51(2) *Journal of Research in Crime and Delinquency* 230, at 231.

<sup>1205</sup> D.T.Herbert & S.W.Hyde 'Environmental Criminology: Testing Some Area Hypotheses' (1985) 10(3) *Transactions of the Institute of British Geographers* 259, at 261.

<sup>1206</sup> It has been advanced that lack of cohesion among residents in a neighbourhood leads to increased risks of crime as well as fear of crime. Thus, if the community works together to proactively take precautions against crime, the environment itself becomes less threatening. See for example T.Lorenc et al. 'Fear of Crime and the Environment: Systematic Review of UK Qualitative Evidence', *op cit* fn 1199 at 5.

<sup>1207</sup> S.Kim R.L.LaGrange & C.L.Willis 'Place and Crime: Integrating Sociology of Place and Environmental Criminology' (2013) 49(1) *Urban Affairs Review* 141, at 145.

<sup>1208</sup> Wood's research has found that knife crime was more problematic in Greater London than elsewhere in the UK. 'There were more teenagers stabbed to death in London by other teenagers than

identity<sup>1209</sup> as they develop boundaries that they claim as their own.<sup>1210</sup> This leads to increased feelings of collectiveness, and it clearly differentiates between insiders and outsiders, which results in higher incidents of violent crime and weapons carrying, as it becomes necessary for the gang to protect their location.<sup>1211</sup> Environmental criminology is thus linked to this research's focus on weapons offences, as it identifies risk factors within the location, and ultimately seeks to reduce these by modifying the environmental aspects.<sup>1212</sup>

Environmental criminology involves several different theoretical strands.<sup>1213</sup> These include pattern theory, rational choice theory, and routine activity theory. Pattern theory '*focuses on the offender and target set in place and time with emphasis on the place of the criminal event ... It tends to study crime statistics or the geographic layout of crime occurrences as opposed to the offender's perspective*'.<sup>1214</sup> Rational choice theory '*focuses on offender decision making ... the offender's perspective of how they use the environment rather than just looking at what motivated the offender*'.<sup>1215</sup> Routine activity theory examines '*the way sociological factors affect community structure that generate illegal acts ... based on human ecology because of the interdependence between social activities that were carried out everyday within the community*'.<sup>1216</sup> Each of these theories influences the current research on self-defence and knife crime, as they demonstrate the key variables generating a situation requiring self-defence, and circumstances in which people carry weapons. Each theory has a different perspective and focus, and contributes a new insight to the debate on self-defence and weapons offences. They all indicate that it is not merely the individual's decision-making and actions that shapes criminality, but that the environment itself can be a signifier. Pattern theory is evident in the previous

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*in the whole of the rest of Britain. 35 per cent of teenagers killed in Greater London were stabbed to death by other teenagers, compared to 16 per cent across the rest of the country*'. R.Wood, *op cit* fn 497 at 100.

<sup>1209</sup> P.J.Brantingham et al. 'The Ecology of Gang Territorial Boundaries' (2012) 50(3) *Criminology* 851, at 852.

<sup>1210</sup> S.Kim R.L.LaGrange & C.L.Willis, *op cit* fn 1207 at 146-147.

<sup>1211</sup> *ibid.*

<sup>1212</sup> Rather than focusing on the offender, environmental criminology concentrates on the influence of the environment in the commission of crime. P.B.Ainsworth *Offender Profiling and Crime Analysis*, (Willan Publishing, Devon), 2001), at 40.

<sup>1213</sup> R.Wortley & L.Mazerolle, *op cit* fn 1202 at 1.

<sup>1214</sup> CPTED Vancouver Design Centre for Crime Prevention through Environmental Design, *op cit* fn 795.

<sup>1215</sup> *ibid.*

<sup>1216</sup> *ibid.*

discussions in Chapter 3 regarding offensive weapons, which found that certain locations had a higher chance of offence perpetration than others. Similarly, rational choice theory supports the notion of territoriality, as the use of space by rival gangs is partly responsible for the incidence of weapons offences. In the same vein, routine activity theory explains this behaviour by focusing on its context, namely the neighbourhood and environment in which it occurs.<sup>1217</sup>

This idea that the design of a location can have a positive or negative impact on crime can shed light on the incidence of weapons offences and self-defence.

*‘The creation of urban environments that are defensible against crime has been a focal point of criminological discourse from as far back as the 1960s, when sociologists discovered that certain places, like people, possess a higher risk of being victimized than others ... the physical design and layout of urban living environments are a principal factor that determine why some places are more vulnerable to crime than others’.*<sup>1218</sup>

Designing an area that allows greater community interaction and observation increases the level of natural surveillance available, and allows residents to gain control over their locality.<sup>1219</sup> *‘Environmental criminologists suggest that the geographic location of various social activities and the architectural arrangements of spaces and building can promote or retard crime rates - mainly crime against property’.*<sup>1220</sup>

The theory of environmental criminology inspired the initiatives of Situational Crime Prevention (SCP), and Crime Prevention through Environmental Design (CPTED).<sup>1221</sup> The idea of the defensibility of space has led to attempts to proactively design space in a manner that limits the possibility of crime in the area.<sup>1222</sup> This

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<sup>1217</sup> Norris notes that three variables are at play here: the offender’s attitude and desire to commit a crime, the presence of a victim, and the lack of regulatory control or somebody to prevent its occurrence. G.Norris ‘Geographical Profiling: From Pins in Maps to GIS’ in W.Petherick *Profiling and Serial Crime: Theoretical and Practical Issues*, (3rd edn, Anderson Publishing (Elsevier Inc.), Oxford, 2014), at 100.

<sup>1218</sup> D.Reynald & H.Elffers, *op cit* fn 796 at 26. This is a reference to Oscar Newman’s 1972 defensible space theory.

<sup>1219</sup> *ibid* at 35.

<sup>1220</sup> T.F.Gieryn ‘A Space for Place in Sociology’, *op cit* fn 1057 at 480.

<sup>1221</sup> E.Carrabine et al. *Criminology: a Sociological Introduction*, *op cit* fn 1056 at 48-49.

<sup>1222</sup> P.Cozens ‘Crime Prevention through Environmental Design’ in R.Wortley & L.Mazerolle (eds), *Environmental Criminology and Crime Analysis*, (Willan Publishing, Devon, 2008), at 153.

approach, termed CPTED, is defined as an attempt ‘*to enhance the urban environment through design that reduces opportunities for crime and nuisance activity*’.<sup>1223</sup> A key factor that is perceived to increase the likelihood of crime is poor visibility. This may be due to several elements, such as lighting, overgrown vegetation, a structural design that allows plenty of hiding places, isolation, and unclear demarcation of public and private spaces.<sup>1224</sup> This is necessarily connected to the discussion of self-defence in the context of householders as it demonstrates why certain households might become better targets than others, and perhaps if increased security measures and neighbourhood watch initiatives were implemented, this would be a more practical solution than extending the test of self-defence.<sup>1225</sup>

These are convenient ways of looking at crime, reaching generalisations and conclusions on the level of its occurrence, as these methods provide proof that crime can be localised. This can provide insight to the locations of self-defence, whether in public or private, and also, for the analysis of the use of weapons. It has been reported that weapons carrying occurs more often in disadvantaged areas within large cities, and that ‘*robbery and serious wounding are both concentrated in a relatively small number of areas*’.<sup>1226</sup> Thus, it is evident that location impacts the incidence of crime, especially crimes affecting the home, such as burglary, and those prevailing in public spaces, such as the possession and use of offensive weapons, by the creation of opportunities for their commission. Many incidents occur as a matter of timing and surrounding, they are dependent on the opportune conditions being present.

### **5.2.2.(a) Opportunism**

The opportunity to commit crime is another consideration that is related to this research topic. Reynald and Elffers note that the accessibility of a location impacts the likelihood that crime will occur there. The easier it is to enter the space, the more people will use it, and this leads to its increased attractiveness to criminals.<sup>1227</sup>

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<sup>1223</sup> CPTED Vancouver Design Centre for Crime Prevention through Environmental Design, *op cit* fn 795.

<sup>1224</sup> T.Lorenc et al. ‘Fear of Crime and the Environment: Systematic Review of UK Qualitative Evidence’, *op cit* fn 1199 at 3.

<sup>1225</sup> A.Ashworth ‘Conceptions of Overcriminalization’, *op cit* fn 613 at 417.

<sup>1226</sup> E.Carrabine et al. *Criminology: a Sociological Introduction*, *op cit* fn 1056 at 139-140.

<sup>1227</sup> D.Reynald & H.Elffers, *op cit* fn 796 at 38.

Bottoms outlines opportune conditions and reasons for seizing the chance to commit property crimes. These are said to be ‘value, inertia, visibility and access’, further separated into two broader groups of (i) the attractiveness of the target, regarding its value or potential, and (ii) its accessibility, in terms of absence of surveillance (technological or natural), and physical access.<sup>1228</sup>

The likelihood that an individual will seize an opportunity which is presented to commit a crime relies on circumstances.<sup>1229</sup> Whether the offence will be carried out is reliant on the presence of the offender at the location at the time, and the attractiveness of the opportunity. More serious crimes are less likely to be purely opportunist, for example as ‘*offenders usually decided to commit a residential burglary ‘in response to a perceived need’, typically an urgent need for money - for drugs, paying the rent, or for some other reason*’,<sup>1230</sup> and are therefore likely to contain some degree of urgency on the part of the offender. By understanding why crimes occur, it is possible to attempt to prevent their occurrence. For example, taking into account the element of opportunity, (which of course is not the only reason why crimes are committed), residents and homeowners can take steps to protect their property and valuables by making them less accessible and visible. While this will not deter all criminals, it goes some way at least towards providing a simple, practical solution.

### **5.2.3 Young people and public places**

In contrast to the focus of the home as a special place and a key component of the formation of identity, a study based in the Netherlands has looked into the importance of public places for young people.<sup>1231</sup> It notes that public places are important ‘*especially for fulfilling important social functions such as the construction of identities*’.<sup>1232</sup> The research notes the importance of the lack of supervision in public places for young people. It is a space in which they are not bothered by rules and their parents, ‘*public spaces offer people a certain kind of freedom to do what they want:*

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<sup>1228</sup> A.E.Bottoms ‘Place, Space, Crime, and Disorder’, *op cit* fn 1053 at 540.

<sup>1229</sup> P.Brantingham & P.Brantingham, *op cit* fn 510 at 5.

<sup>1230</sup> A.E.Bottoms ‘Place, Space, Crime, and Disorder’, *op cit* fn 1053 at 548.

<sup>1231</sup> M.Lieshout & N.Aarts “Outside Is Where It’s At!” - Youth and Immigrants’ Perspectives on Public Spaces’ (2008) 11(4) *Space and Culture* 497.

<sup>1232</sup> *ibid.*

*“No one cares about what you do here ... public space offers people a kind of privacy; they can enjoy a certain anonymity by being able to disappear into the mass”.*<sup>1233</sup> This may be viewed as a surprising statement, as generally, one might expect to be more inhibited rather than liberated in public places. For example, one might possibly expect this due to fear that there is a higher potential for an altercation with the law and the police. However, it is clear that for young people in this study, there was a higher level of supervision and interference at their homes than in public spaces. This finding is confirmed by Abbott-Chapman and Robertson, who explain that public places can sometimes be appreciated by some as ‘private space’, representing a shift in the perception and assumptions attached to public and private spaces, and their use and roles within society.<sup>1234</sup>

Additionally, the use of space can vary between different groups and individuals, creating a zone of inclusion and exclusion. Lieshout and Aarts explain:

*‘Firstly, self-organization is a way to informally influence something; people must organise themselves to make a space their place. In many public spots, unwritten and informal rules apply that determine how things work, and who is and who is not welcome there. Second, visible (or audible) behaviour at a certain place can make other people reluctant to visit it’.*<sup>1235</sup>

This is particularly true in relation to the discussion on youths and ‘turf’ or ‘postcode’ wars, as this describes their acquisition of control over their local areas.<sup>1236</sup> Particularly interesting in this context is the claim that

*‘processes of inclusion and exclusion in public spaces, such as the case of fenced-in neighbourhoods, can lead to greater discrepancies between (groups of) people. In general, behaviour that emphasizes a strong sense of us and them is perceived negatively ... Processes of exclusion disturb the self-regulating principle and therefore make public space less safe instead of safer’.*<sup>1237</sup>

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<sup>1233</sup> *ibid.*, at 504.

<sup>1234</sup> J.Abbott-Chapman & M.Robertson, *op cit* fn 1062 at 423.

<sup>1235</sup> M.Lieshout & N.Aarts, *op cit* fn 1231 at 506-507.

<sup>1236</sup> See previous discussion on pages 115 and 226 regarding postcode wars.

<sup>1237</sup> M.Lieshout & N.Aarts, *op cit* fn 1231 at 510.



That finding seems to ring very true regarding the carrying of weapons in certain locations within cities, for fear of rivalries with other gangs and stepping outside one's own territory onto another's claimed space.

Gunter conducted research on the attitudes of groups of youths, with a significant emphasis towards a culture of 'badness'.<sup>1238</sup> He found that the behaviour '*is not about rebellion or hedonism, rather it is centred upon meeting up with friends ... is about friendships, routine and the familiar ... or doing nothing*'.<sup>1239</sup> Far from being menacing, the suggestion here is that the young people, who are regarded as problematic because they congregate in public places, are in fact harmless.<sup>1240</sup> Despite their negative appearance, most of these young people are merely interested in spending time with friends on common ground. The attitudes amongst these young people are not primarily centred upon committing crimes, but rather, on building a reputation and status for themselves within their community.<sup>1241</sup> These actions have resulted in increased policing efforts to confront the unease that young people who behave in this way can generate,<sup>1242</sup> and to try to change the use and perception of public places, in which no particular group should dominate others.

The discussion of these issues relating to the use of public places by young people provides an example of the type of crimes and fear that occurs in public as opposed to private places. It explores the notion that not all people form stronger attachments with their home than they do with certain public places. It is also clear that many are more concerned about threats in public places than they are with threats in their homes. Therefore, it raises questions about the change in the law of self-defence for householders, because it does not support the decision to amend the law in one context only, at the expense of all individuals resorting to defensive force elsewhere. The discussion is connected to the analysis in this thesis on the carrying of offensive weapons, as it demonstrates that the strong territoriality and rivalry between various

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<sup>1238</sup> The term 'badness' in this context refers to an antisocial nature, a deviant character, or an immoral disposition.

<sup>1239</sup> A.Gunter, *op cit* fn 1078 at 352.

<sup>1240</sup> However, this should not provide basis for generalisation, as this is unlikely to be true in all cases.

<sup>1241</sup> A.Gunter, *op cit* fn 1078 at 352-353.

<sup>1242</sup> Groups of youth congregating in public can create intimidation within communities and potential for anti-social behaviour. Visible policing of 'hotspots' combined with stop and search powers are an attempt to disperse and deter criminal activities.

gangs often provides the incentive for weapon carrying. Nevertheless, it also shows that it is often the reputation of individuals within neighbourhoods that are key to their motivation, and not the commission of any particular crimes or anti-social behaviour.

This topic is related in a way to the following section on moral luck. The idea of moral luck is similarly based on chance, defining moral status where an agent lacks control,<sup>1243</sup> and presenting challenges to an individual who must act in a difficult situation. It can be argued that these young people are not in full control over their behaviour.<sup>1244</sup> Their actions are partly influenced and directed by their circumstances, or by their criminogenic environment.<sup>1245</sup> Thus, they must conduct themselves in a certain way by virtue of their status and positioning within society. Accordingly, there is more involved in choice than one's free will alone, as the social context<sup>1246</sup> of the decision or action is also influential.<sup>1247</sup>

#### **5.2.4 Moral luck**

Nagel describes moral luck as '*where a significant aspect of what someone does depends on factors beyond his control, yet we continue to treat him in that respect as an object of moral judgement*'.<sup>1248</sup> According to moral luck, the status of an actor as a moral agent depends not on one's control and thoughts, but on one's actions in the circumstances.<sup>1249</sup> The theory is controversial and not all agree with its tenets; as Statman explains, it is sometimes considered to be an oxymoron due to the allocation of responsibility in the absence of control.<sup>1250</sup> Nagel explains four different situations

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<sup>1243</sup> D.Statman 'Moral Luck and the Problem of the Innocent Attacker' (2015) 28(1) *Ratio* 97, at 98.

<sup>1244</sup> Their age could also be a factor, as youth affects one's ability to conduct oneself, especially in difficult circumstances. R.Holton & S.Shute 'Self-Control in the Modern Provocation Defence', *op cit* fn 238 at 68.

<sup>1245</sup> See page 114 regarding the argument for recognising that such individuals should be treated differently under criminal law. See also Morse, who claims that such individuals are not excused for lacking control, but are victims of injustice and inequality within society. S.J.Morse 'Culpability and Control', *op cit* fn 388 at 1653.

<sup>1246</sup> For example, it has been argued that disadvantaged backgrounds impair an individual's choice to commit a crime. See, M.Bagaric 'Rich Offender, Poor Offender: why it (Sometimes) Matters in Sentencing', *op cit* fn 301 at 1, and 10-12.

<sup>1247</sup> R.A.Duff, *op cit* 190 at 150.

<sup>1248</sup> T.Nagel 'Moral Luck' in S.M.Cahn & P.Markie *Ethics: History, Theory and Contemporary Issues*, (3rd edn, Oxford University Press, New York, 2006), at 720.

<sup>1249</sup> D.Statman, *op cit* fn 1243 at 103 and 109.

<sup>1250</sup> *ibid.*

and types of moral luck: *‘the phenomenon of constitutive luck - the kind of person you are ... luck in one’s circumstances - the kind of problems and situations one faces ... the causes and effects of action: luck in how one is determined by antecedent circumstances, and luck in the way one’s actions and projects turn out’*.<sup>1251</sup> All four variations of moral luck are relevant to this discussion on self-defence, and particularly on the relevance of location to the defence, which relies to some extent upon luck.

#### **5.2.4(a) Luck in one’s person and luck in one’s circumstances**

The first aspect of Nagel’s definition, namely the individual’s characteristics has already been discussed in Chapter 2.<sup>1252</sup> It is possible to consider the contribution of neuro-scientific enquiries and research in this context, which could prove that we have been pre-programmed to produce certain reactions to certain situations, as well as the emotion of fear.<sup>1253</sup> This means that the actions of a person reacting in self-defence may be subconsciously pre-determined in terms of the level of reaction and force that will be used. This depends upon the individual’s DNA make-up, which predisposes a particular response, even if the individual has not personally considered it.

An important study by Soon et al.<sup>1254</sup> disclosed that brain activity precedes or predetermines actions, prior to the moment that the subjectively free decision is made by the individual. The research found that *‘the outcome of a decision can be encoded in brain activity of prefrontal and parietal cortex up to 10 s*<sup>1255</sup> *before it enters awareness’*.<sup>1256</sup> Therefore, science suggests that while we may believe that we are fully in control of our decisions and act on them instinctively this may be far from the truth. In fact, it is suggested that an unconscious mental process has already started to prepare our action or reaction ahead of the point when we become aware of our

<sup>1251</sup> T.Nagel ‘Moral Luck’, *op cit* fn 1248 at 721.

<sup>1252</sup> See section 2.3 in Chapter 2 for further discussion.

<sup>1253</sup> The relevance and influence of the fear emotion will be considered in the next chapter.

<sup>1254</sup> C.S.Soon et al. ‘Unconscious Determinants of Free Decisions in the Human Brain’ (2008) 11(5) *Nature Neuroscience* 543, at 543.

<sup>1255</sup> s = seconds.

<sup>1256</sup> C.S.Soon et al., *op cit* fn 1254 at 543.

intention.<sup>1257</sup> The area of the brain involved in such decisions is the supplementary motor area (SMA), and studies have indicated that this section predetermines the individual's action before it enters personal awareness.<sup>1258</sup> More specifically, the research also noted that '*the preparatory time period reveals that this prior activity is not an unspecific preparation of a response. Instead it specifically encodes how a subject is going to decide*'.<sup>1259</sup> Thus, it can be noted that this questions the true level of control that a person has over their free will to reach decisions, which could alter our appreciation of the actions taken by individuals in self-defence.

Opposing debates are developing between two groups: on the one side, philosophers advocate that the concept of free will is unimpaired by this scientific research, and, on the other side, scientists claim that the evidence has unsettled the foundations of free will through the concept of determinism.<sup>1260</sup> Science has not yet fully proved the predictability of an outcome,<sup>1261</sup> and cannot confirm conclusively that all decisions are made before the subject becomes aware of them.<sup>1262</sup> Smith notes that if it transpires that perfect prediction of action is possible by analysing the unconscious brain activity, this would indeed challenge free will.<sup>1263</sup>

In this regard, determinism presents challenges to the criminal law,<sup>1264</sup> as it contrasts with our notion of responsibility, questioning the philosophical foundations of the legal approach.<sup>1265</sup> Traditionally, in order to be criminally responsible, one must also

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<sup>1257</sup> This presents a challenge to free will and the claim that '*people can always learn to control, or to compensate for, their dispositions*'. A.Ashworth 'Taking the Consequences' in S.Shute J.Gardner & J.Horder (eds), *Action and Value in Criminal Law*, (Clarendon Press, Oxford, 1993), at 108.

<sup>1258</sup> C.S.Soon et al., *op cit* fn 1254 at 543.

<sup>1259</sup> *ibid*, at 545.

<sup>1260</sup> Determinism advocates that '*all particles in the universe follow set trajectories*'. K.Koch 'How Physics and Neuroscience Dictate Your "Free" Will', (*Scientific American*, 7 May 2012) <<http://www.scientificamerican.com/article/finding-free-will/>> (accessed on 26/02/14). Westen notes that a confirmation of determinism means that all thought and perceived choices by an individual are pre-determined. P.Westen 'Getting the Fly out of the Bottle: the False Problem of Free Will and Determinism' (2004-2005) 8 *Buffalo Criminal Law Review* 599, at 607. Similarly, Harris states that determinism causes free will to be no more than an illusion. S.Harris *Free Will*, (Free Press, New York, 2012), at 15.

<sup>1261</sup> Indeed there is a need for further neuroscientific understanding before definitive standards can be incorporated into the criminal law. N.A.Vincent 'On the Relevance of Neuroscience to Criminal Responsibility' (2010) 4 *Criminal Law and Philosophy* 77, at 93.

<sup>1262</sup> D.K.Nelkin 'Moral Luck' *op cit* fn 1181 at 16.

<sup>1263</sup> K.Smith 'Taking Aim at Free Will' (2011) 477 *Nature* 23, at 24.

<sup>1264</sup> S.Harris *Free Will*, *op cit* fn 1260 at 1.

<sup>1265</sup> L.Claydon 'Mind the Gap: Problems of Mind, Body and Brain in the Criminal Law' in M.D.A.Freeman & O.R.Goodenough (eds), *Law, Mind and Brain*, (Ashgate, Surrey, 2009), at 59.

be free, and be acting according to one's free will. However, if determinism is proved, namely that all actions are predetermined, this undermines the notion of free will, and could lead to problems with the assessment of an individual's culpability.<sup>1266</sup> On the other hand, Westen disagrees and claims that the conflict between determinism and free will is a 'false problem'.<sup>1267</sup> Perhaps it should be viewed as freedom to determine one's actions according to one's internal functioning of the mind, free from outside interference or coercion, rather than as being in complete control of the entire decision-making process occurring within one's mind.<sup>1268</sup> This is the compatibilist approach which considers that free will may be retained despite pre-determination, as thoughts, intentions, and actions remain individual to each person.<sup>1269</sup> It may be said that conscious individuals maintain the power to accept or reject the chosen action, and exercise intention before committing to undertake it.<sup>1270</sup> Therefore, the subconscious preparation could merely be shedding light on the whole thought process behind decision-making, and the point at which people become fully aware of their decision is only one cog in the machinery, thus not such a crucial point as may first be anticipated.<sup>1271</sup>

This is significant in terms of moral luck as it could be a distinguishing feature in different cases of self-defence even in similar situations. The consequences of an unarmed intruder breaking into two separate properties could pivot on the fact that one defender had unconsciously decided on a weapon of opportunity, while the other had no pre-determination to use and locate a weapon. While the first case may result

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<sup>1266</sup> Further research and technological advancements are necessary before any approach towards criminal responsibility can be amended. As Glannon notes '*there is no empirical measure that could establish a threshold at which one is responsible and under which one is not responsible*'. W.Glannon 'What Neuroscience Can (and Cannot) Tell Us About Criminal Responsibility' in M.Freeman (ed), *Law and Neuroscience: Current Legal Issues*, (Oxford University Press, New York, 2011), at 19. See also E.Aharoni et al. 'Can Neurological Evidence Help Courts Assess Criminal Responsibility? Lessons from Law and Neuroscience' (2008) 1124 *Annals of the NY Academy of Sciences* 145, at 146-147.

<sup>1267</sup> P.Westen 'Getting the Fly out of the Bottle: the False Problem of Free Will and Determinism', *op cit* fn 1260 at 652.

<sup>1268</sup> There are different ways of viewing free will, and it has been noted that human beings are free, even if the mind is pre-programmed. D.Mobbs et al. 'Law, Responsibility and the Brain' in M.D.A.Freeman & O.R.Goodenough (eds), *Law, Mind and Brain*, (Ashgate, Surrey, 2009), at 6.

<sup>1269</sup> S.Harris *Free Will*, *op cit* fn 1260 at 20; and P.Westen 'Getting the Fly out of the Bottle: the False Problem of Free Will and Determinism', *op cit* fn 1260 at 609.

<sup>1270</sup> R.M.Ryan & E.L.Deci 'Self-Regulation and the Problem of Human Autonomy: Does Psychology Need Choice, Self-Determinism, and Will?' (2006) 74(6) *Journal of Personality* 1557, at 1574; M.Freeman 'Introduction: Law and the Brain' in M.Freeman (ed), *Law and Neuroscience: Current Legal Issues*, (Oxford University Press, New York, 2011), at 6; E.Aharoni et al., *op cit* fn 1266 at 147.

<sup>1271</sup> K.Smith, *op cit* fn 1263 at 25.

in the intruder's death, in the second, the intruder may be physically detained and remain unharmed. In both cases, the defenders are held to the standard of the reasonable person. Determinism has shown that different individuals can respond differently in the face of similar threats. This is not a surprising or innovative conclusion, but it does create ripples in the water in respect of expected criminal law standards, and supports a strong appreciation of subjective factors when considering self-defence.

However, despite their differences, neither defender would be able to rely on determinism alone as an explanation for their actions. As Smith highlights '*biological determinism doesn't hold up as a defence in law. Legal scholars aren't ready to ditch the principle of personal responsibility. "The law has to be based on the idea that people are responsible for their actions, except in exceptional circumstances"*'.<sup>1272</sup> Therefore, while these factors may play a crucial role within one's reaction to a situation requiring force in self-defence, they are unlikely to be taken into consideration while measuring the validity of the defence. This is not to say of course that such individuals would be left completely without a defence to their criminal action. The law does appreciate that certain individuals possess differing levels of control, and that those who possess a lower level may not be fully responsible for their actions, due to diminished responsibility for example.<sup>1273</sup>

Similarly, the second type of moral luck explained by Nagel is particularly clear in one's use of defensive force against an intruder. The element of moral luck or bad luck results from the circumstances of having one's home invaded or being approached on the street by an aggressor. The defender has been thrown into a difficult position by virtue of his circumstances and it is as a result of moral luck that he faces the dilemma.

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<sup>1272</sup> *ibid.* Quoting Nicolas Mackintosh, the director of a project on neuroscience and law run by the Royal Society in London. The potential impact of these discoveries could provide a measurement of individual responsibility for actions in the future, if it can be proved that all decisions can be consistently predicted.

<sup>1273</sup> Shermer notes that '*a system has "degrees of freedom", or a range of options that may result from its complexity and the number of intervening variables ... Some people ... have fewer degrees than others, and the law adjusts for their lowered capacity for legal and moral accountability*'. M. Shermer 'How Free Will Collides with Unconscious Impulses', (*Scientific American*, 26 July 2012), <<http://www.scientificamerican.com/article/how-free-will-collides-with-unconscious-impulses/>> (accessed on 16/01/14).

#### 5.2.4(b) The causes and effects of action

The third and fourth elements of Nagel's definition refer to the causes and effects of the action taken in self-defence, and are pivotal in terms of the punishment one will potentially receive. Due to the need to use force against the aggressor, a situation is caused by the aggressor and is out of the control of the defender who is simply responding to it, which could result in the death of the aggressor. In such circumstances, the defender was placed in an involuntary position.

If the degree of defensive force used results in serious harm or the death of the aggressor, the defender is still assessed as a moral agent.<sup>1274</sup> Even if the circumstances themselves are beyond the individual's control,<sup>1275</sup> providing they retain a degree of control over their own capacities to act or react, they will be considered in control within the particular context that has arisen.<sup>1276</sup> This view is reinforced by Enoch and Marmor who say that '*The scope of moral responsibility depends, rather, on how foreseeable, probable, or likely the consequence was, given the relevant information available to the agent at the time of action*'.<sup>1277</sup> This statement reflects the nature of a decision on the applicability of self-defence, as it takes into consideration the circumstances, as the defender understood them to be at the time, and thus bases the lawfulness of one's actions upon the reasonableness of the action within such a context.

The reason for this is that a person is still considered to be a moral agent,<sup>1278</sup> and is therefore subject to moral judgment.<sup>1279</sup> The reason why individuals retain their status as moral beings for such assessment, despite the lack of control they exercise over the situation, is not easy to explain. Nelkin has discussed that this is contrary to the general expectation that people are responsible for the actions and behaviours that are

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<sup>1274</sup> D.K.Nelkin 'Moral Luck' *op cit* fn 1181 at 17.

<sup>1275</sup> Duff explains that control involves '*sensitivity to reasons: we have control over our actions in so far as what we do depends on or can be guided by what we see reason to do*'. R.A.Duff, *op cit* 190 at 160.

<sup>1276</sup> R.Holton & S.Shute 'Self-Control in the Modern Provocation Defence', *op cit* fn 238 at 70.

<sup>1277</sup> D.Enoch & A.Marmor 'The Case Against Moral Luck' (2007) 26(4) *Law and Philosophy* 405, at 406.

<sup>1278</sup> *ibid* at 406. Despite lack of control over the situation, the individual remains assessable according to moral standards.

<sup>1279</sup> D.K.Nelkin 'Moral Luck' *op cit* fn 1181 at 1.

under their control, known as the ‘control principle’.<sup>1280</sup> Nevertheless, despite the clear logic behind such a principle, adhering to a strict approach along these lines would make it extremely difficult to apply any moral responsibility for one’s actions. Indeed, the law has developed a way of side stepping the control principle, and provides doctrines to deal with moral luck through the application of defences (be they excuses or justifications) in appropriate situations. The agent’s actions, outside of the threatening circumstances and without the unlawfulness of the aggressor’s actions, would usually be a criminal wrong punishable by the standards of the criminal law. Nevertheless, one could be found justified in one’s actions and therefore not liable, depending on the circumstances and one’s moral luck.<sup>1281</sup>

Nevertheless, it is challenging for the defender to know with certainty what the outcome will be prior to taking the defensive action. *‘In many cases of difficult choice the outcome cannot be foreseen with certainty. One kind of assessment of the choice is possible in advance, but another kind must await the outcome, because the outcome determines what has been done’*.<sup>1282</sup> This is particularly true in relation to the situation faced by the householder when an intruder breaks into his home, and he uses force against him in self-defence. The matter of the reasonableness or justifiability of his actions will depend on the gravity of the injuries sustained by the intruder, whether he survives or dies, whether the force was proportionate, disproportionate, or grossly disproportionate. The reason for this can be explained as being that, *‘one is responsible for what one actually does - even if what one actually does depends in important ways on what is not within one’s control’*.<sup>1283</sup> This is one reason (among many already specified) why the change in the test of self-defence from reasonable force to grossly disproportionate force could be so damaging, as one is responsible for the consequences of one’s actions despite the manner in which the course of events leading up to the action proceeds.

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<sup>1280</sup> *ibid.*

<sup>1281</sup> As Williams has explained *‘what we are discussing is ... the determination of the agent’s judgement on his decision by what, beyond his will, actually occurs’*. B.A.O.Williams & T.Nagel ‘Moral Luck’ (1976) 50 *Proceedings of the Aristotelian Society, Supplementary Volumes* 115, at 126.

<sup>1282</sup> Nagel, T. ‘Moral Luck’, *op cit* fn 1225 at 722.

<sup>1283</sup> *ibid* at 724.



### **5.3 Conclusion**

It is clear that the concept of location is crucial for the law of self-defence, and is particularly involved in the development of the recent law reform in England and Wales on the householder defence. Explanations of the special nature of the home have been evaluated, with the historical notion that ‘one’s home is one’s castle’, providing increased protection for homeowners defending within their own homes, without extending to public places. This is perhaps due to the heightened fear that individuals experience during home invasions, as well as the serious breach of the right to privacy. There are strong sentiments attached to the home which surround the debate about the householder defence, and clearly there has been an emphasis on the protection of security and control that the home offers to its inhabitants. However, while homes afford security to their inhabitants, public places are supposed to be safe for all people. Therefore, it is problematic to increase the scope of self-defence in merely one context.

This chapter has considered different theories that offer explanations of what exactly forms the essential ingredient in the home that distinguishes the way in which self-defence is considered. It has been questioned whether the crucial variable in this debate is the inside/outside dimension or the home/non-home dimension. Those arguing in favour of the castle theory would support the latter variable, but with its emphasis on the trespasser requirement, the inside/outside dimension is in fact the most important in respect of the legislation and the householder defence.

The field of criminology provided insight into additional reasons that support the differentiation between public and private spaces. The fear of crime discussion was particularly telling, as it highlighted that the most common fears for the public are not in line with the change of householder defence. It is noteworthy that ‘street robbery’ is one of the primary fears of the general public.<sup>1284</sup> Considering this, it is further unclear why the push for a change to the law was so centred upon self-protection in the home. It may be asserted that the legislative change was made without a full appreciation of these matters.

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<sup>1284</sup> A.Gunter, *op cit* fn 1078 at 359.

Further, rather than amending the law without clear evidence of necessity, there are other practical alternatives available. For example, it was highlighted that reducing opportunities for crime and designing spaces accordingly would be a better allocation of resources. The amendment generalises perceptions of public and private spaces without appreciating the broader context. Young people in particular, often regard their local area (postcode, street, neighbourhood), as being their property, and hold the view that they ‘own’ the area in which they live. Differentials of power and economics prevent them from owning a more conventional piece of private space, thus leading to a need to protect their home environment. If the castle theory is the correct one, should it not also be able to encompass the home ‘turf’? It is also necessary to question the definitional limits of the home, where does it begin and end, for example does it extend to the garage, the drive, and the garden?<sup>1285</sup> The legislation appears to restrict the increased test to within the home only, but there may be grounds for a wider interpretation with gated or enclosed gardens. These are important considerations for the use of weapons and will be a determining factor of the offence committed.

The significance of location to cases of self-defence has certainly been shown to be of great import and value in this chapter, through the exploration of various theories. Two elements have come to light, namely the role of emotions and the potential that media representations can have in influencing the public’s general perception of this topic. The following chapter will explore these issues further, considering the relevance of emotions in cases of self-defence and offensive weapons, and the influence of the media on public perception and the occurrence of crime.

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<sup>1285</sup> Thanks must be acknowledged to Richard Ireland for his brilliantly insightful discussion and debate on this aspect of the research, and especially to his email correspondence on the 29th of May 2012.

## **Chapter 6: Emotions and the Media**

### **6. Introduction**

This chapter considers the relevance and impact of two forms of pressures and influences on the law of self-defence, and the possession of offensive weapons. There are many issues which potentially impact upon or can be affected by the laws in these areas, but this chapter is focussed on the implications of emotions and media representations.

Emotion can play a crucial role within the commission of crimes, and can largely shape a person's decision on whether or not to act, and in what way to respond. It is submitted here that emotion, particularly fear, could impact a case of self-defence and the decision to carry a weapon, and on occasion, that it should be considered by the courts as a relevant factor.

In addition, the media has an important role to play through the communication, and dissemination of information of public interest. Therefore, the mass media are responsible for the reporting of offences involving the possession of offensive weapons, as well as cases of self-defence. This role is vital as it represents the main method by which the majority of people come into contact with such discourse.<sup>1286</sup> Nevertheless, it can occasionally misinform people and cause fear through the exaggeration of facts, and reporting styles which often divorce reality from rhetoric. It is thus necessary to examine the effect of media reporting on the debate on both self-defence and possession offences.

### **6.1 Emotions**

It can reasonably be argued that emotions are present and influential in both cases of self-defence and crimes involving offensive weapons. First, in order to appreciate the role of emotions, it is necessary to provide an overview of its relationship with criminal law generally. Secondly, consideration will be given to the responses that are

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<sup>1286</sup> L.A.Svendsen *Philosophy of Fear*, (Irons, J. tr, Reaktion Books, London, 2008), at 55.

generated by emotions. Thirdly, the role of fear in self-defence will be explored. Fourthly, the role of emotions in offensive weapons cases will be deliberated. Fifthly, a comparison is drawn between self-defence and the traditionally emotional defences of duress and loss of control. Finally, the emotion of guilt and its connection to the harms involved with inchoate offences is considered, as this is closely tied to possession offences.

### **6.1.1 Overview of the role of emotions in criminal law**

*‘It might seem obvious that human emotions play a significant part in the commission of crime, in punishment and social control’.*<sup>1287</sup> Few would disagree that the role of emotion can be crucial and highly influential within the realms of the criminal law. From determinations regarding appropriate levels of punishment to decisions to commit crimes,<sup>1288</sup> *‘emotions are ubiquitous in criminal law, as they are in life’.*<sup>1289</sup> From fear to anger, many emotions can be involved in the process of determining one’s action and response to any given situation.

Indeed, emotions strongly influence human behaviour and thus criminal behaviour,<sup>1290</sup> and can be said to *‘shape the landscape of our mental and social lives’.*<sup>1291</sup> Emotions are therefore to be firmly regarded as a factor for consideration by the criminal law. As Maroney observes, the law has always been willing to show due regard to the significance of emotions, despite the view that reason and emotion are entirely different entities, and that the law should primarily be concerned only with reason.<sup>1292</sup> This approach to reason and emotion will shortly be explored whilst explaining the forces of emotions, particularly the emotion of fear.

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<sup>1287</sup> E.Carrabine et al. *Criminology: a Sociological Introduction*, *op cit* fn 1056 at 170.

<sup>1288</sup> E.Spain *The Role of Emotions in Criminal Law Defences*, (Cambridge University Press, Cambridge, 2011), at 6.

<sup>1289</sup> D.M.Kahan & M.C.Nussbaum ‘Two Conceptions of Emotion in Criminal Law’ (1996) 96(2) *Columbia Law Review* 269, at 270.

<sup>1290</sup> E.Spain, *op cit* fn 1288 at 32.

<sup>1291</sup> M.C.Nussbaum *Upheavals of Thought: The Intelligence of Emotions*, (Cambridge University Press, Cambridge, 2001), at 1.

<sup>1292</sup> T.A.Maroney ‘Law and Emotion: A Proposed Taxonomy of an Emerging Field’ (2006) 30(2) *Law and Human Behaviour* 119, at 120.

The special role of emotions within the law is evident in the argument by Kahan and Nussbaum, that individuals who kill another person as a result of fear or anger should be punished far less severely than those who have calculated and premeditated the act of killing, and who act on their unlawful intentions without being under the influence of extreme emotion.<sup>1293</sup> This demonstrates how the presence of emotions can attract different outcomes, moral and value judgments. Indeed, with regard to moral reasoning, the term ‘moral involuntariness’ has developed to explain situations in which defenders are not truly responsible for their actions as they lack free choice.<sup>1294</sup> The situation triggers the emotion that renders the action involuntary.<sup>1295</sup> This in part can be explained by accepted features of emotions as being generated when something of interest to the individual is engaged; motivating and directing action by preparing the individual for events; and bearing some control over the action undertaken.<sup>1296</sup>

While there are many different emotions such as love, joy, compassion, anger, rage, jealousy, and disgust,<sup>1297</sup> the primary emotion of concern to this research is fear. The reason being that fear is cited as the main reason for possessing offensive weapons, and is a natural occurrence in cases where individuals resort to the use of force in self-defence. This section seeks to illuminate how the emotion of fear can be highly relevant and pertinent in cases of self-defence and weapons offences. Bourke has stated that ‘*fear has a strong claim to be one of the most dominant emotions*’,<sup>1298</sup> and in relation to this research it certainly will be considered in this manner.

### **6.1.2 Mechanistic and evaluative conceptions of emotions**

Emotions are described as states of being which simply happen to individuals, as opposed to being chosen or controlled by them. They have strong effects and can overcome individuals extremely quickly allowing little or no time for an alternative

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<sup>1293</sup> D.M.Kahan & M.C.Nussbaum, *op cit* fn 1289 at 324.

<sup>1294</sup> S.Yeo ‘Revisiting Necessity’, *op cit* fn 450 at 19-20; G.Williams ‘Necessity: Duress of Circumstances or Moral Involuntariness?’, *op cit* fn 89 at 8.

<sup>1295</sup> B.L.Berger ‘Emotions and the Veil of Voluntarism: The Loss of Judgment in Canadian Criminal Defences’ (2005-2006) 51 *McGill Law Journal* 99, at 108.

<sup>1296</sup> K.R.Scherer ‘Emotions are Emergent Processes: they Require a Dynamic Computational Architecture’ (2009) 364 *Philosophical Transactions of the Royal Society B* 3459, at 3459.

<sup>1297</sup> D.M.Kahan & M.C.Nussbaum, *op cit* fn 1289 at 276.

<sup>1298</sup> J.Bourke *Fear: A Cultural History*, (Virago Press, London, 2005), at 8.

response.<sup>1299</sup> This view of emotion links into the discussion of two separate theories of emotions, what Kahan and Nussbaum refer to as the ‘mechanistic conception’ and the ‘evaluative conception’. These views approach the understanding and explanation of emotions in entirely different ways. Simply put, the mechanistic conception regards emotions as forces that are devoid of reason, and which are incapable of moral evaluation, while in contrast, the evaluative theory advances that emotions are examples of cognitive decisions that lend themselves to moral reason.<sup>1300</sup>

The mechanistic conception approaches emotions as compulsive forces that happen to the individual without allowing sufficient time for a considered thought process, ‘*emotions feel like things that sweep over us, or sweep us away, or invade us, often without our consent or control – and this intuitive idea is well preserved in the view that they really are impulses or drives that go their own way without embodying reasons or beliefs*’.<sup>1301</sup> Many would agree with this view, as indeed emotions can have strong effects on those who experience them. For example, Horder has proclaimed in relation to fear, especially when arising in emergency situations that the emotion can be understood to take over the individual’s rational thought process, and therefore might lead to ‘negligent wrongdoing’.<sup>1302</sup> This is reflected in Sartre’s argument, which demonstrates the power of emotions, that ‘*the emotion is undergone. One cannot get out of it as one pleases; it fades away of itself, but one cannot put a stop to it*’.<sup>1303</sup> This view is in line with the mechanistic conception, as it ascribes significant force to emotions as states of being that overpower the individual, and consequently interferes with one’s ability to rationalise.

Svendsen has examined the relationship between brain function and emotions, particularly in relation to fear. He explains that the amygdala<sup>1304</sup> is the part of the brain responsible for this response, and notes that ‘*the amygdala sends signals so*

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<sup>1299</sup> P.Ekman ‘Basic Emotions’ in T.Dalgleish & M.Power (eds) *Handbook of Cognition and Emotion*, (John Wiley & Sons, Chichester, 1999), at 54.

<sup>1300</sup> D.M.Kahan & M.C.Nussbaum, *op cit* fn 1289 at 273.

<sup>1301</sup> *ibid* at 278-279.

<sup>1302</sup> J.Horder ‘Cognition, Emotion, and Criminal Culpability’ (1990) 106 *Law Quarterly Review* 469, at 483.

<sup>1303</sup> J.P.Sartre *Sketch for a Theory of the Emotions*, (Mairet, P. tr, Meuthen & Co Ltd, London, 1962), at 76.

<sup>1304</sup> Glannon confirms the importance of this section of the brain in reacting to fear and ensuring survival. W.Glannon, *op cit* fn 1266 at 24.

*quickly that they overwhelm us before we have any chance of intervening rationally ... There is quite simply very little human reason can do when fear sets in*'.<sup>1305</sup> This demonstrates that fear can certainly impact an individual's ability to formulate decisions, but so too can anger, and these emotions often explain seemingly irrational actions taken by citizens in certain circumstances.<sup>1306</sup>

However, it is not logical to always assert that the emotion itself restricts any thought processing on behalf of the individual. Jones too has explored the way in which the brain functions to send signals for certain emotions, and claims that the brain functions to produce predispositions of response for specific emotions when stimulated.<sup>1307</sup> However, he clarified that this does not necessarily produce a definite predictable response as '*a predisposition is not a predetermination*'.<sup>1308</sup> This suggests that the individual does have a degree of control over the response to the emotion, which in fact would support the proposition of the evaluative conception approach to emotions.

It is possible that people are occasionally able to rein in even intense emotions, and to take control over the situation which gave rise to it, and act accordingly. Consider a person who is easily angered and who often lashes out under temper. Having become aware of and accepted this propensity, one may be inclined to attempt psychotherapy to manage the anger. Consequently, the individual may be able to successfully undergo emotion management techniques, and gain control over the emotion when it is experienced. In this regard, the evaluative conception is therefore more appropriate, and indeed is the preferred theory by Kahan and Nussbaum for explaining emotions.<sup>1309</sup>

At the core of the evaluative conception is the belief that emotions include judgements about the objects that trigger them, that is to say, that the value of the subject is evaluated as an integral part of the emotion felt. This view explains that the emotion includes moral appraisal, and a reasoned feeling about the object, for

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<sup>1305</sup> L.A.Svendsen, *op cit* fn 1286 at 25.

<sup>1306</sup> Jr.H.L.Chambers 'Fear, Irrationality, and Risk Perception' (2004) 69 *Missouri Law Review* 1047, at 1047 and 1049.

<sup>1307</sup> O.D.Jones 'Law, Emotions, and Behavioural Biology' (1999) 39 *Jurimetrics* 283, at 288.

<sup>1308</sup> *ibid*, at 285.

<sup>1309</sup> D.M.Kahan & M.C.Nussbaum, *op cit* fn 1289 at 350.

example '*fear perceives the impending harm as significant*',<sup>1310</sup> which is why it generates the reaction in the individual. While the mechanistic conception classifies emotions as conditions that immobilise the individual's ability to control himself, the evaluative approach believes that it is possible for individuals to retain self-control<sup>1311</sup> when faced with extreme emotions, and that responsibility for those reactions should not be taken away from the individual.<sup>1312</sup> This placing of responsibility is pertinent in cases of duress and loss of control which will be discussed shortly.

The evaluative conception is reflected in self-defence, as defenders are assessed according to the reasonable person test. The defence attaches great significance to the reasonableness and rationality of one's actions, and the responsibility for the conduct. Although fear is not a defined part of self-defence, the defence often involves the emotion of fear.<sup>1313</sup> The defender will be facing a serious threat or attack, and thus will be in fear of his personal safety, or the safety of another. The following section explores this connection between fear and self-defence, first by delving deeper into the nature of fear and why it is experienced, and secondly, applying it within the specific case of self-defence.

### **6.1.3 Responses that result from emotions**

Some emotions can produce specific types of responses from individuals. These responses can happen instinctively without allowing sufficient time for the actor to go through a process of reasoning about the potential consequences.<sup>1314</sup> This follows on from a concept which has already been briefly introduced, that emotion and reason are separate entities. McGill explains that there is popular opinion regarding this distinction and separation of emotion and reason, and it is thought that the law should be careful whilst taking emotional considerations into account, as its realm of concern

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<sup>1310</sup> *ibid* at 285.

<sup>1311</sup> Ingalese explains the concept of self-control as '*the control of the objective mind by the subjective mind*'. R. Ingalese 'The Art of Self-control', (Lecture Four, *The History and Power of Mind*, 11th edn, Dodd, Mead and Company, New York, 1929), <<http://www.svpvril.com/Ingalese/ingalese4.html>> (accessed on 22/07/15), at 2.

<sup>1312</sup> E. Spain, *op cit* fn 1288 at 70-71.

<sup>1313</sup> The absence of fear as an express component of self-defence stands in contrast to its defined presence in the defence of loss of control. See section 6.1.6 on emotional excuses for further elaboration on the different role of emotion within these defences.

<sup>1314</sup> L.A. Svendsen, *op cit* fn 1286 at 38.



should rather be reason. McGill demonstrates the difference between these two cognitive functions,

*‘when a man thinks clearly, and behaves in a deliberate and rational fashion, it is assumed that emotion is absent, suppressed or under control. When he “loses his head” or acts stupidly, his conduct is described as emotional, and reason is supposed to be absent or distraught by feeling’.*<sup>1315</sup>

Therefore, emotion is viewed as an unstable state, which is inferior to reason, which is in contrast more settled and reliable.

However, as emotions can impact upon one’s ability to reason, by influencing the response in a person’s subconscious, it is necessary to understand how this occurs and why. Ekman has conducted research into the emotions and has discovered that there are *‘distinctive patterns of autonomic nervous system (ANS) activity for anger, fear and disgust’*.<sup>1316</sup> What this means is that emotions exhibit certain trends of reactions when triggered that have been evolved to prepare the actor, for example, anger is often associated with fighting, while fear is often associated with fleeing.<sup>1317</sup> While there may not be a conclusive fear pattern,<sup>1318</sup> it seems that flight has become commonly associated with fear,<sup>1319</sup> as a method of creating the maximum distance from the actor and that which is causing his fear.<sup>1320</sup> Both these emotions are also associated with certain feelings. Anger is said to be accompanied by a *‘boiling feeling’* while fear in contrast is accompanied by a *‘chilled and queasy feeling’*.<sup>1321</sup>

Bourke has shown that there are not only clearly distinguishable reactions which are produced by different emotions, but that the same emotion can lead to different responses. For example, she explains how different fears can lead to different reactions within the actor, *‘adrenalin often overwhelms individuals afraid of being attacked, while individuals terrified of contracting tuberculosis experience no such*

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<sup>1315</sup> V.J.McGill *Emotions and Reason*, (Charles C Thomas, Springfield, 1954), at vii of preface.

<sup>1316</sup> P.Ekman, *op cit* fn 1299 at 48.

<sup>1317</sup> *ibid* at 50.

<sup>1318</sup> V.J.McGill, *op cit* fn 1318 at 26.

<sup>1319</sup> K.W.Simons ‘Self-defense: Reasonable Beliefs or Reasonable Self-control?’, *op cit* fn 444 at 77.

<sup>1320</sup> L.A.Svendsen, *op cit* fn 1286 at 31.

<sup>1321</sup> M.C.Nussbaum, *op cit* fn 1291 at 60. Posner also agrees with the association of certain feelings with specific emotions, confirming the warmth of anger. E.A.Posner ‘Law and the Emotions’ (2000-2001) 89 *Georgetown Law Journal* 1977, at 1979.

*physiological response*'.<sup>1322</sup> In this instance, the individual has very little input to the responses of one's fears. Some argue that this ANS<sup>1323</sup> response is a process of evolution, while others counter that it is a product of culture and societal learning, as people have been '*taught to engage in different types of behaviour when experiencing different emotions*'.<sup>1324</sup> For example, the history and experience of an individual will shape their fear, and the fear emotion is not universal across the human population.

Furedi suggests that culture can influence sources of fear, namely, which objects or events produce a fearful reaction, as different cultures have different fears and ways of responding to them.<sup>1325</sup> This view is logical and natural as '*even though the emotions undoubtedly have a biological basis, it is clear that they are also shaped by both individual experiences and social norms. Emotions have an evolutionary, a social and a personal history*'.<sup>1326</sup> Therefore, the composition of an emotion is not easily deconstructed, as it is a symptom of multiple interconnected factors which has caused it to be felt and to develop into the response taken by the individual.

Similarly, as emotions can induce certain responses, some emotions can produce specific types of crime, or are more often connected to specific crimes than others. Passion is one example, often resulting in 'crimes of passion'. A notable feature of these crimes is that they are often viewed as tragedies, as they are committed by ordinary people who would not normally offend, but merely do so as a response to their circumstances. They can be said to be '*fuelled by one or more of a myriad of emotions - the wounds of betrayal, the hurt of infidelity, broken hearts, wounded pride, spoiled virtue, jealousy, envy, and many more, they are criminalised by their acts*'.<sup>1327</sup> Although these emotions are natural human feelings which cannot easily be controlled, (in the sense that the individual does not choose to feel them, they are intrinsic reactions to events), they cannot be ignored if and when they lead to serious criminal acts, if and when they cross the line from being mere emotions to causing devastating consequences.

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<sup>1322</sup> J.Bourke, *op cit* fn 1298 at 6-7.

<sup>1323</sup> This term was explained on the previous page.

<sup>1324</sup> P.Ekman, *op cit* fn 1299 at 49.

<sup>1325</sup> F.Furedi *Culture of Fear Revisited*, (Continuum, London, 2006), at 7.

<sup>1326</sup> L.A.Svendsen, *op cit* fn 1286 at 24.

<sup>1327</sup> E.Carrabine et al. *Criminology: a Sociological Introduction*, *op cit* fn 1056 at 170.

#### **6.1.4 Fear and self-defence**

There appears to be a general consensus as to why fear is felt. Svendsen,<sup>1328</sup> Kahan<sup>1329</sup> and Nussbaum<sup>1330</sup> agree that fear is triggered when something of value to an individual is under threat. Fear arises when individuals are anxious that the things of importance to them, such as family, freedom, and life, are at risk of an attack, and that the threat faced is serious. Thus, fear becomes a standard and natural reaction in the face of such danger, as individuals will strive for self-preservation and to protect those entities which are of great value to them.<sup>1331</sup> As Nussbaum explains '*what inspires fear is the thought of damages impending that cut to the heart of my own cherished relationships and projects*'.<sup>1332</sup> For this reason, acting in fear can be considered a reasonable response,<sup>1333</sup> and could therefore potentially be an important consideration when dealing with cases of self-defence.

The emotion of fear could not only affect cases of self-defence, but could also provide clear evidence of self-defence situations. The law in this respect acknowledges that situations of self-defence are problematic in that the individual does not have enough time to fully calculate and consider all the risks involved, and the consequence that may eventuate following the course of action chosen.<sup>1334</sup> Such circumstances are highly intense and demand spontaneous, instinctive reactions, and '*people who respond instantly out of emotion may be the ones we praise, and those who stay on the sidelines (to consider what is rationally required of them) may be the ones we blame*'.<sup>1335</sup> Therefore, an action as opposed to inaction may carry increased risks, but might also be the morally superior choice to make. As noted earlier, it may be claimed that these reactions are involuntary as the individual does not have any choice but to act, and thus they are not fully responsible for their conduct. However, there is a

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<sup>1328</sup> L.A.Svendsen, *op cit* fn 1286 at 12.

<sup>1329</sup> D.M.Kahan & M.C.Nussbaum, *op cit* fn 1289 at 286.

<sup>1330</sup> M.C.Nussbaum, *op cit* fn 1291 at 28.

<sup>1331</sup> L.A.Svendsen, *op cit* fn 1286 at 13.

<sup>1332</sup> M.C.Nussbaum, *op cit* fn 1291 at 31.

<sup>1333</sup> E.Spain, *op cit* fn 1288 at 69; S.Yeo 'Revisiting Necessity', *op cit* fn 450 at 33. While it could be argued that acting in fear involves a selfish quality, it is comparable to a situation of choosing between lives, which was discussed in Chapter 2, section 2.2.4.

<sup>1334</sup> The lack of alternative option available to the defender due to the emotion of the moment means that he is not fully responsible for his actions. This deduction on the defender's lack control relates to the theory of capacity. See E.Spain, *op cit* fn 1288 at 44.

<sup>1335</sup> J.Horder 'Cognition, Emotion, and Criminal Culpability', *op cit* fn 1302 at 481.

general expectation that an attempt should be made to control emotions before acting on them; excusatory defences recognise situations where such control has failed.<sup>1336</sup>

The problems that arise from instinctive, defensive reactions are addressed by the standards and securities of the reasonable force test. This requires an action to be both necessary and proportional in the circumstances in order for it to be classified as reasonable.<sup>1337</sup> In applying a test to determine whether the action taken constitutes reasonable force, this demands a standard of all individuals to act according to the situation, in a reasonable and not unreasonable manner. This reflects that ‘*as a matter of moral psychology ... even in a sudden emergency, we expect people to exercise residual powers of cognition that should prevent them grossly overreacting or making crass mistakes*’.<sup>1338</sup> There is a presumption that people are able to respond adequately but not excessively to difficult circumstances, and this is stronger for those in high intensity vocations, such as the police, especially given their training, who are expected to act more calmly and reasonably in the face of danger.

On this point, we return to the case of *Beckford*,<sup>1339</sup> who acted out of fear to protect both himself and his colleagues. In this situation it is considered that a policeman, who has been trained for such events, would not experience fear in the same way as an ordinary person, and so the standard of expectation regarding his response will be higher. It is perfectly reasonable to assume that ‘*those whose job it is to face danger ought to be better prepared for it when it arrives than those for whom it comes as a bolt from the blue*’.<sup>1340</sup> Indeed, this appeals to an assessment of common sense. Horder argues that ‘*the law ought to expect ordinary people who act in the maelstrom of circumstances, under the influence of great and immediate fear or compassion, to exercise only such residual powers of cognition as should prevent them making crass mistakes as a result of their emotional state*’.<sup>1341</sup> It appears therefore, that the law demands a higher standard of control to be exercised by those whose vocation provides training to prepare them for dangerous situations, than it does of the general public. Nevertheless, completely irrational behaviour in the face of extreme emotion

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<sup>1336</sup> B.L.Berger, *op cit* fn 1295 at 111.

<sup>1337</sup> This has been discussed at length in Chapter 2.

<sup>1338</sup> J.Horder ‘Cognition, Emotion, and Criminal Culpability’, *op cit* fn 1302 at 483.

<sup>1339</sup> *R v Beckford* *op cit* fn 103. Discussed previously in Chapter 2.

<sup>1340</sup> J.Horder ‘Cognition, Emotion, and Criminal Culpability’, *op cit* fn 1302 at 485.

<sup>1341</sup> *ibid* at 484.

by the ordinary person will not be without scrutiny.<sup>1342</sup> The reasonable force test requires the defensive action taken to be both necessary and proportionate in the circumstances, thus, a minimal standard of self-control is in operation. This displays an expectation for individuals to exercise courage<sup>1343</sup> and control, and places the general presumption in favour of human ability to reach this standard.<sup>1344</sup>

It may be asserted that the law of self-defence is governed by principles conducive to the evaluative conception of emotions.<sup>1345</sup> This view appoints a narrow construction of self-defence, allowing the defence only when reasonable force has been used, therefore being both necessary and proportionate.<sup>1346</sup> However, the law assesses the circumstances according to the defender's belief, and therefore, while applying an objective test overall, it also includes an element of subjective analysis. Consequently, this enables the fairest application of the law. Indeed, Spain advances this view, explaining that the reasonable person test gives due regard to the morality of one's actions, by assessing their appropriateness, while the subjective element ensures justice by considering the individual's experience, with '*the availability of the defence dependent upon his or her individual thoughts and emotions*'.<sup>1347</sup> The test can therefore be considered to incorporate an appreciation of the intense emotions felt by the individual at the time of the defence, while not allowing this to cloud judgement altogether by demanding that only reasonable force be used.

Kahan and Nussbaum discuss the belief that there is no consideration of emotion in the law of self-defence, that it is a defence which considers emotions as irrelevant. They reached the conclusion that such a view would be misguided and incorrect. They say that

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<sup>1342</sup> E.Smith, *op cit* fn 996 at 123.

<sup>1343</sup> In the sense of facing one's fears, see G.Williams 'Necessity: Duress of Circumstances or Moral Involuntariness?', *op cit* fn 89 at 21.

<sup>1344</sup> This can be compared to the general presumption of sanity - for the insanity defence to apply, evidence must be adduced to rebut this presumption. See *R v McNaughten* (1843) 8 E.R. 718; (1843) 10 Cl. & F. 200, where at 719 it was held that '*... jurors ought to be told that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction*'.

<sup>1345</sup> D.M.Kahan & M.C.Nussbaum, *op cit* fn 1289 at 328.

<sup>1346</sup> *ibid* at 329.

<sup>1347</sup> E.Spain, *op cit* fn 1288 at 31.

*‘It is impossible to understand why self-defense doctrine prefers the death of the aggressor to the impairment of certain interests without appreciating the law’s assessment of the defendant’s emotions ... the defense doesn’t require proof that a particular defendant was motivated by a particular emotion, but the contours of the doctrine nevertheless reflect understandings about what kinds of emotions a “reasonable person” ... would experience in particular situations ... if a person has no realistic choice but to use deadly force, then her use of such force is neither culpable nor deterrable’.*<sup>1348</sup>

In assessing the circumstances as the defender believed them to be at the time, this undeniably inserts an appreciation of the emotions felt into the assessment of the defence. This view is supported by Maroney, who claims that the defence indeed incorporates elements of fear, in terms of the experience of the individual both psychologically and physically,<sup>1349</sup> and this view is accepted in this research. Although there is no specific question of one’s emotional state in the defence, it nevertheless exists within the overall assessment of the circumstances, through the subjective belief of the defender at the time. If the reaction by the defender was chosen as a response to the fear and terror of the situation, this undoubtedly contributes to the moral evaluation of his reaction. The reason for this is that fear indicates a situation of self-defence; indeed, it would be rare to find a situation of self-defence where fear was not present.

Therefore, fear suggests a reasonable reaction, which can be verified by recourse to the reasonable force test. The reasonableness of killing in self-defence was discussed in Chapter 2, and the existence of fear contributes to the understanding that on occasion it can be reasonable to kill in self-defence.<sup>1350</sup> As already mentioned, an analysis of the reasonableness of one’s actions includes an assessment of proportionality. The proportionality of killing has been an issue within the defence of necessity. Ost discusses the defence within the context of euthanasia and medical practitioners’ relieving the suffering of patients, and claims that it is for the courts of England and Wales to determine whether severe suffering, although not life

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<sup>1348</sup> D.M.Kahan & M.C.Nussbaum, *op cit* fn 1289 at 328.

<sup>1349</sup> T.A.Maroney, *op cit* fn 1292 at 126.

<sup>1350</sup> See the previous discussion in relation to necessity and the case of *R v Latimer*, (*A-G of Canada and others intervening*), *op cit* fn 244.

threatening, can be a proportionate harm to the taking of life.<sup>1351</sup> Nevertheless, proportionality within self-defence contrasts with proportionality within necessity,<sup>1352</sup> especially within the context of relieving patient suffering. The reason is that self-defence involves defensive action by one person to protect himself against the unlawful threat posed by another. There is a clear balancing between individuals, one who is aggressing, and one who is defending. Thus, the question of proportionality relates to the matching of the defensive action to the level of threat posed, considering the harm that would be suffered by the defender as well as the wrong being committed by the aggressor.<sup>1353</sup> If the threat is to life, it will be proportionate for the fearful defender to kill to avoiding suffering the harm himself.<sup>1354</sup>

Taking this a step further, it can be argued that on occasion the test of self-defence can be regarded as applying the principles of the evaluative conception of emotion, as opposed to its general trend towards the mechanistic view. This is evident in the treatment of the home or place of residence as exceptional institutions, and goes beyond the mere feelings of fear to including a person's pride and dignity.<sup>1355</sup> This follows on from the discussion in the previous chapter on location, and specifically the castle doctrine which has developed in some areas to safeguard the rights of homeowners.

It is clear that emotions can be a vital factor in cases of self-defence. The main emotion involved is fear, and this is also probably the most obvious emotion, (along with anger perhaps), engaged in cases involving offensive weapons which will be discussed shortly. Within circumstances of self-defence, the very fact that one is acting upon an impulsive reaction to a threat or danger, renders the action acceptable. Owing to the individual's belief that one's life is in danger, one's reaction is excused on the basis that *'his belief, if genuinely held, and however unreasonable, negatives*

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<sup>1351</sup> S.Ost 'Euthanasia and the Defence of Necessity: Advocating a More Appropriate Legal Response', *op cit* fn 247 at 366-367.

<sup>1352</sup> Uniacke bases this difference on the lesser evil assessment of harm in necessity, as opposed to the defence against an unjust threat in self-defence. S.Uniacke 'Proportionality and Self-defense', *op cit* fn 60 at 265-266.

<sup>1353</sup> *ibid* at 253.

<sup>1354</sup> As a consequence of the comparative value of the harm avoided to the harm caused. S.Uniacke 'Proportionality and Self-defense', *op cit* fn 60 at 256. See also Leverick's discussion on killing to prevent rape, F.Leverick *Killing in Self-defence*, *op cit* fn 8 at 143-158.

<sup>1355</sup> D.M.Kahan & M.C.Nussbaum, *op cit* fn 1289 at 329.

*mens rea; for his belief precludes with the intention to act unlawfully*'.<sup>1356</sup> This means that true cases of self-defence, lack a necessary ingredient of crime, that of a guilty intention, or *mens rea*. This is true even if the defender as well as intending to preserve himself, intends to cause some harm to the attacker in self-defence. The intention with which one decides to act is therefore a vital consideration in determining the punishment for the commission of the act, as in circumstances satisfying the test of self-defence, the defensive action is not unlawful.

However, the pre-emptive carrying of weapons constitutes a problematic reaction to fear. People who carry weapons with them as a response to the fear that they experience, or perhaps the anger they feel, face a challenge as they are committing a crime in the first place by possessing such articles. While emotions can influence a decision to carry a weapon, it is not usually a sufficient explanation for the behaviour.

#### **6.1.5 Emotions and offensive weapons**

As has been shown, when a person acts out of fear they are not fully in control of their actions as they are moved by their emotions. As in cases of self-defence, this is similarly important in cases involving the possession of offensive weapons - although it does not carry the same weight. It has been said in several cases involving the possession of offensive weapons that fear alone is not enough to excuse the behaviour.<sup>1357</sup> This links back to the discussion of the harm principle, as the carrying of offensive weapons greatly increases dangers within communities, and exposes society to unjustifiable risks. Therefore, although emotions can be very influential in the commission of crimes, the determining of the criminal's culpability, and the punishments that should be prescribed, emotions are only a consideration which may be indicative of the actor's intention, and are not conclusive evidence on their own. However, as will be seen below, emotion is not directly taken into consideration by the courts, other than in the defence of loss of control.

The power of emotions in crime is reflected clearly in Loewy's statement that '*one acting on the emotions of the moment is relatively unlikely to be deterred by the*

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<sup>1356</sup> J.Horder 'Cognition, Emotion, and Criminal Culpability', *op cit* fn 1302 at 471.

<sup>1357</sup> See section 3.4 in Chapter 3.



*prospect of substantial punishment*'.<sup>1358</sup> This is especially true in self-defence cases, where often an instant reaction is taken without appreciating the consequences of the action. Indeed, it is agreed that no deterrent effect is possible with instinctive reactions of self-defence, and thus a severe punishment is not practical or merited.<sup>1359</sup> A person acting under the pressures of fear would quite reasonably respond in the same way again if faced with an immediate attack. However, the fear that influences weapons carrying has a different nature to the traditional fear of self-defence. The reason for this is that it is a constant state of fear as opposed to a feeling that suddenly overcomes the defender when faced with a threat. Perhaps this lends itself more to the emotion of anxiety than it does to fear, as the emotion is ever present due to the environment in which the individual lives.

It has been shown that emotions can generate specific responses in individuals. As already explained, fear is often associated with fleeing, while anger results in fighting or striking out.<sup>1360</sup> It may be argued that individuals who arm themselves with weapons, in a way, reverse the typical responses to these emotions. They carry weapons as a result of fear, but on this assessment, the act of arming oneself with a weapon is perhaps a more expected result of anger than fear. Carrying a weapon could be considered more in line with the typical fight response of anger.<sup>1361</sup> Indeed, as an offensive weapon it sends a signal of conflict to an aggressor. However, Svendsen provides an explanation of this seeming confusion between emotional responses, as he claims that fear can be accompanied not only by flight but also by attack, and says that '*fear can undoubtedly motivate attacks ... emotions motivate action, but they do not determine it*'.<sup>1362</sup> Thus, the fear that these individuals experience on this analysis can impact their decision to carry a weapon. By virtue of their fear, they overestimate the risk of harm, and take action in self-preservation.<sup>1363</sup>

However, due to the nature of weapons offences, (which was discussed in Chapter 3), it is possible that fear is not the only motivator for possession, and that other

<sup>1358</sup> A.H.Loewy, *op cit* fn 401 at 309.

<sup>1359</sup> See Fletcher's discussion of 'pointless punishment' with regards to excuses: G.P.Fletcher *Rethinking Criminal Law*, *op cit* fn 70 at 813-817.

<sup>1360</sup> E.A.Posner, *op cit* fn 1321 at 1981.

<sup>1361</sup> *ibid.*

<sup>1362</sup> L.A.Svendsen, *op cit* fn 1286 at 30.

<sup>1363</sup> E.A.Posner, *op cit* fn 1321 at 1982 and 2001.

additional concepts creep into one's impulse to carry a weapon. In the specific context of weapons offences, primarily connected to young people and the perceived gang or street culture, a theme that runs through the literature is that 'respect' is a vital notion within such communities. The notion of respect here is that there is a way to treat individuals, and there is an expectation that respect must be earned and maintained, and if tarnished, then revenge should be enacted.<sup>1364</sup> The preservation of this respect is shown through one's willingness to fight to protect it, to be fearless when faced with threats, and to seek retribution in situations where they are disrespected.<sup>1365</sup> This it is said can lead to cycles of violence, as different groups or gangs challenge each other whenever their respective territories have been crossed.<sup>1366</sup> It is argued that this can in part explain the emotions of fear, anger, and resentment that surround these cultures. This leads to a belief that one should constantly be aware of dangers and threats, and should expect to come into contact with adversaries. Consequently, a motivation is provided for decisions to carry weapons, as they might be needed for self-defence.

This understanding of the factors behind the behaviour of carrying weapons has been confirmed by Karstedt, who says that '*Concern for identity and autonomy arouses intense feelings of anger if not treated with respect and recognition, and being shamed is a most powerful source of rage and feelings of revenge*'.<sup>1367</sup> Therefore, this provides an explanation of the different emotions and influences at play in decisions to carry weapons. There is certainly a mixture of different emotions at play in the dynamics of weapons possession. In contrast to the feelings of anger and rage mentioned by Karstedt above, fear is the most common emotion explaining weapons possession, especially knives in the UK.<sup>1368</sup> As already explained in this thesis,<sup>1369</sup> studies have found that fear is the key reason that individuals arm themselves with

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<sup>1364</sup> S.Antrobus (chairman), *Breakthrough Britain: Dying to Belong*, *op cit* fn 558 at 25.

<sup>1365</sup> E.Carrabine et al. *Criminology: a Sociological Introduction*, *op cit* fn 1056 at 178.

<sup>1366</sup> *ibid* at 180.

<sup>1367</sup> S.Karstedt 'Emotions and Criminal Justice' (2002) 6 *Theoretical Criminology* 299, at 308. A study by the Centre for Crime and Justice Studies also found that desire for respect was a key motivator in weapon carrying, closely followed by fear of crime. P.Squires et al. *Street Weapons Commission: Guns, Knives and Street Violence*, *op cit* fn 557 at 36-37.

<sup>1368</sup> C.Eades et al. 'Knife Crime' A Review of Evidence and Policy, *op cit* fn 495 at 22; S.Antrobus (chairman), *Breakthrough Britain: Dying to Belong*, *op cit* fn 558 at 22, 54, and 64.

<sup>1369</sup> This was discussed at page 147.

weapons.<sup>1370</sup> Individuals who encounter threatening and violent situations on a daily basis take the decision to prepare themselves so that they will be able to protect themselves, as they are fearful of harm from others.<sup>1371</sup> Living in a community where crime and violence is a regular occurrence,<sup>1372</sup> and a culture of carrying weapons is present causes the risk of harm to be significant, and correspondingly leads many individuals to fear for their lives. This fear correlates with the decision to carry a weapon.<sup>1373</sup>

There is thus a connection between the carrying of offensive weapons and the defence of self-defence, as most individuals who carry weapons are reacting to the emotion of fear. However, self-defence is not the only defence that attracts debate in relation to the effect that emotions have on legal application. Indeed, comparatively, self-defence is far less concerned with emotions than are the defences of duress and loss of control, which have been referred to as ‘emotional excuses’.<sup>1374</sup> The following section briefly explores the importance of the emotions of fear and anger within these defences.

#### **6.1.6 Emotional excuses: duress and loss of control**

In general, the defences most associated with emotional responses are duress and loss of control, previously known as provocation.<sup>1375</sup> The former is most often associated with fear, specifically a fear of a threat of harm that impels the individual to act according to the ordering of the source of the threat.<sup>1376</sup> In contrast, the latter was historically associated with the emotion of anger or rage,<sup>1377</sup> which paralyses the actor’s self-control, and thus they lose control of their actions. The source of the emotion shapes the response induced, and there is an expectation that a person’s

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<sup>1370</sup> See for example: D.Shaw et al. *op cit* fn 523 at 269; S.Roe & J.Ashe, *op cit* fn 753 at 14; C.Eades et al. ‘Knife Crime’ A Review of Evidence and Policy, *op cit* fn 495 at 21; and D.Sethi et al (eds), *op cit* fn 495 at v-vi.

<sup>1371</sup> B.Kinsella *Tackling Knife Crime Together - A Review of Local Anti-Knife Crime Projects - Executive Summary*, *op cit* fn 814 at 1-3.

<sup>1372</sup> S.Antrobus (chairman), *Breakthrough Britain: Dying to Belong*, *op cit* fn 558 at 60.

<sup>1373</sup> *ibid* at 65.

<sup>1374</sup> S.Uniacke ‘Emotional Excuses’ (2007) 26(1) *Law and Philosophy* 95, at 95.

<sup>1375</sup> The definition of the new defence was set out in fn 240.

<sup>1376</sup> Fear as a naturally occurring emotion is the most common precursor to many other emotions and crimes. R.Ingalese *op cit* fn 1311 at 3.

<sup>1377</sup> Since the abolition of provocation and the introduction of loss of control, the defence now permits fear of serious violence as a qualifying trigger, under section 55(3) of the Coroners and Justice Act 2009.

normal behavioural choices are different to his preferences when under the power of emotions.<sup>1378</sup> Posner explains that the reason behind the emotion is always important as it is indicative of whether an excuse may be offered or not, provided an adequate explanation for the emotional response is present.<sup>1379</sup> When considering criminal defences, although the circumstances and emotion may cause the defendant to act out of character, this alone is insufficient.<sup>1380</sup> It is not the emotion or altered character alone that excuses the action, but also the triggering reason behind it, the underlying motive for reacting.

The defences of duress and loss of control are classified as excuses, or emotional excuses. As Uniacke explains, these defences ‘*excuse the conduct of a person of normal cognitive and volitional capacities who acts under pressure of external circumstances that generate a powerful emotional response from which a wrongful action results*’.<sup>1381</sup> Applying this analysis to the defences, in relation to duress, the result is that the individual’s will is regarded as overborne by the emotion of fear, arising from an imminent threat. With loss of control, the individual’s actions are considered to be out of one’s control as a result of intense anger or fear.<sup>1382</sup> An individual’s loss of control must be due to one of two possible qualifying triggers.<sup>1383</sup> The first qualifying trigger is that a fear of serious violence,<sup>1384</sup> while the second relates to anger generated from things said or done, giving rise to ‘circumstances of an extremely grave character’,<sup>1385</sup> and causing the defendant to experience a ‘justifiable sense of being seriously wronged’.<sup>1386</sup> Both these defences, in part, excuse the behaviour due to the lack of responsibility of the individual for his involuntary actions.<sup>1387</sup>

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<sup>1378</sup> E.A.Posner, *op cit* fn 1321 at, at 1978.

<sup>1379</sup> *ibid*, at 1980.

<sup>1380</sup> W.Wilson ‘The Structure of Criminal Defences’ (2005) *Criminal Law Review* 108, at 109.

<sup>1381</sup> S.Uniacke ‘Emotional Excuses’, *op cit* fn 1374 at 95.

<sup>1382</sup> Drogin has discussed the defence within the American context, and refers to it as an instance of ‘*extreme emotional disturbance*’. E.Y.Drogin ‘Commentary: Extreme Emotional Disturbance (EED), Heat of Passion, and Provocation: A Jurisprudential Science Perspective’ (2008) 36 *Journal of Psychiatry & Law* 133, at 134.

<sup>1383</sup> S.Parsons ‘The Loss of Control Defence – Fit for Purpose?’ (2015) 79(2) *The Journal of Criminal Law* 94, at 94.

<sup>1384</sup> Section 55(3) of the Coroners and Justice Act 2009.

<sup>1385</sup> Section 55(4)(a) of the Coroners and Justice Act 2009.

<sup>1386</sup> Section 55(4)(b) of the Coroners and Justice Act 2009.

<sup>1387</sup> S.Uniacke ‘Emotional Excuses’, *op cit* fn 1374 at 103.

However, these defences do not excuse one's behaviour entirely, as the defences question the individual's ability to take steps to control the emotion as opposed to allowing it to become all-consuming of one's will. In relation to duress, Spain claims that despite the extreme fear experienced, '*the actor is understood always to be capable of choosing whether or not to submit to the threat*'.<sup>1388</sup> The same is true of those acting as a result of loss of control; there is a degree of expectation that human beings should be able to control their emotions, and a failure to do so will lead to culpability for the action taken.<sup>1389</sup> The loss of control defence asserts this expectation through the objective requirement that '*a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D*'.<sup>1390</sup> Further, this expectation is reflected in the fact that unlike self-defence, duress is not available against a murder charge, and loss of control is only a partial defence.<sup>1391</sup> Perhaps this is an indication that the individual has failed in relation to the level of effort expected, and thus merits some blame.<sup>1392</sup> There is an assumption that most people are able to keep their reactions under control even when faced with a threat, and acting under emotion.<sup>1393</sup>

Fear has already been examined at length in this chapter, but the loss of control defence also permits a consideration of the emotion of anger. Anger is a rather different emotion to fear, both in terms of the responses it triggers in the actor and the way in which the actor is judged. Research has found that anger affects an individual's physiology in preparation for a physical confrontation by a warm sensation of blood surging to the upper body,<sup>1394</sup> producing an eruptive reaction.<sup>1395</sup>

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<sup>1388</sup> E.Spain, *op cit* fn 1288 at 67.

<sup>1389</sup> S.Uniacke 'Emotional Excuses', *op cit* fn 1374 at 97.

<sup>1390</sup> Section 54(1)(c) of the Coroners and Justice Act 2009.

<sup>1391</sup> Another difference is that self-defence is available against a broader range of threats (to life, or lesser harms such as actual bodily harm (ABH)), whereas a person relying on the defence of duress must be reacting as a result of a threat of death or serious harm (GBH). See D.W.Elliott 'Necessity, Duress and Self-defence' (1989) *Criminal Law Review* 611, at 616 for a discussion on this.

<sup>1392</sup> R.Holton & S.Shute 'Self-Control in the Modern Provocation Defence', *op cit* fn 238 at 63.

<sup>1393</sup> K.W.Simons 'Self-defense: Reasonable Beliefs or Reasonable Self-control?', *op cit* fn 444 at 83-84.

<sup>1394</sup> Fear on the other hand prepares the individual to flee through a cooling sensation drawing blood away from the upper body down to the lower body. R.Lowe & T.Ziemke 'The Feeling of Action Tendencies: on the Emotional Regulation of Goal-Directed Behaviour' (2011) 2(346) *Frontiers in Psychology* 1, at 20.

<sup>1395</sup> S.S.M.Edwards 'Anger and Fear as Justifiable Preludes for Loss of Self-Control', *op cit* fn 16 at 228; S.S.M.Edwards 'Abolishing Provocation and Reframing Self-defence – the Law Commission's Options for Reform' *op cit* fn 16 at 183.

The emotion clouds the actor's judgement and reasoning capabilities.<sup>1396</sup> Anger can be considered to be a less acceptable emotional reason for action than fear, as it has at its core the motivation of retribution for some harm suffered;<sup>1397</sup> as Lyons states '*anger is that desire for revenge*'.<sup>1398</sup> While anger is capable of inducing strong debilitating forces that overcome individuals causing loss of self-control,<sup>1399</sup> the place from which anger originates is much darker than fear, as it is essentially a very negative emotion fuelled with the desire for revenge and retribution. It is thus clear that the loss of control action resulting from anger should not be considered as morally favourable<sup>1400</sup> as, for example, fear in cases of self-defence, as the motivation is entirely different.

Despite this statement on the moral status of the emotions of anger and fear, and despite the likely presence of fear in self-defence situations, fear has no specific place within the defence. It may be suggested that the reason for the absence of direct consideration of fear in self-defence is down to the justificatory and general nature of the defence.<sup>1401</sup> While with loss of control, elements of blame remain attached to the actor and the action taken, in self-defence the conduct is considered lawful. Thus, additional proof of compelling evidence for the behaviour is required with the excuse defences, to show that the defendant would not have acted in such a manner when unmoved by emotion.<sup>1402</sup> With self-defence, there is no need for this additional emotional explanation, although fear is likely to be assumed in most cases.<sup>1403</sup> Nevertheless, this demonstrates how significant the impact of emotion can be on one's responses, and the important connection between emotion and the criminal law.

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<sup>1396</sup> R.Holton & S.Shute 'Self-Control in the Modern Provocation Defence', *op cit* fn 238 at 53.

<sup>1397</sup> R.S.Lazarus 'The Cognition-Emotion Debate: A Bit of History' in T.Dalgleish & M.Power (eds) *Handbook of Cognition and Emotion*, (John Wiley & Sons, Chichester, 1999), at 6.

<sup>1398</sup> W.Lyons 'Philosophy of Cognition and Emotion' in T.Dalgleish & M.Power (eds) *Handbook of Cognition and Emotion*, (John Wiley & Sons, Chichester, 1999), at 23.

<sup>1399</sup> R.Holton & S.Shute 'Self-Control in the Modern Provocation Defence', *op cit* fn 238 at 57-58.

<sup>1400</sup> E.Spain, *op cit* fn 1288 at 69.

<sup>1401</sup> Loss of control is not a general defence as it is only available against a murder charge.

<sup>1402</sup> Williams asserts that in assessing whether the defendant exercised choice over his actions while experiencing fear or terror, due to the strength of these emotions, they should be incorporated into the reasonable person test. G.Williams 'Necessity: Duress of Circumstances or Moral Involuntariness?', *op cit* fn 89 at 9.

<sup>1403</sup> D.J.Baker, *op cit* fn 466, at 704; H.Frowe, *op cit* fn 97 at 5.

### 6.1.7 Guilt and inchoate offences

Another emotion of relevance is the ‘moral emotion’ of guilt.<sup>1404</sup> This emotion is different to the emotions that have already been discussed, namely, fear and anger, as it does not trigger a reaction in the individual in the same way.<sup>1405</sup> While the previous emotions discussed are relevant as they shape an individual’s actions, guilt is commonly experienced after the action has produced negative consequences,<sup>1406</sup> and influences the way the individual is judged and punished.

While feelings of guilt would not prevent or deter a person from acting in self-defence, nor necessarily from carrying offensive weapons, in relation to the latter, guilt is relevant to the way in which the actor is perceived and dealt with by the law. With regard to offences of possession, guilt is connected to the level of harm that is caused by the action. One reason why the occurrence of harm and the gravity of the harm shape the punishment imposed is that feelings of guilt are likely to be far stronger when harm has been caused. Different people will experience different levels of guilt, and a person with high moral standards that has never committed a crime will probably feel more guilt than a career criminal.<sup>1407</sup> This is likely to be particularly evident in a classic case of self-defence, where typically an innocent, good natured individual finds himself faced with the need for defensive action against an aggressor.<sup>1408</sup> However, generally, greater feelings of guilt are expected when a harm has been caused than when a harm has been attempted and failed, or has been recklessly or negligently risked, despite not causing the harm.

To provide an example, consider two labourers who carry a penknife as a matter of course for their work. Both neglect to remove the penknife from their pocket before

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<sup>1404</sup> According to Eisenberg, a moral emotion is distinguishable from the basic emotions as it has a ‘*fundamental role in morality*’. N.Eisenberg ‘Emotion, Regulation, and Moral Development’ (2000) 51 *Annual Review of Psychology* 665, at 666.

<sup>1405</sup> *ibid* at 667. The experience of guilt may be described as ‘*regret over wrongdoing*’.

<sup>1406</sup> Consider for example the case of Vincent Cooke discussed earlier, (see page 238). Although he acted in lawful self-defence, the guilt and anxiety that he felt following killing a violent intruder in his home reduced him to reliance on medication.

<sup>1407</sup> While character (moral or immoral) may influence the guilt felt by the individual, it does not provide an excuse for one’s behaviour. S.J.Morse ‘Culpability and Control’, *op cit* fn 388 at 1602, and 1607-1608; and R.A.Duff, *op cit* 190 at 167; N.Eisenberg, *op cit* fn 1404 at 670.

<sup>1408</sup> Indeed, this is true to a certain extent in relation to the case of *R v Hussain and another op cit* fn 953. Here, although the actions were considered more akin to a revenge attack than to self-defence, the previous good character of the defendants mitigated the harshness of the punishment awarded.

going out for the evening.<sup>1409</sup> While the first labourer does not encounter any trouble and the penknife remains in his pocket throughout the evening, the second is involved in a fight during which he stabs a man in the neck with the penknife, causing his death. Despite taking the same risk, the latter has caused harm, and may experience guilt, while the former will not.<sup>1410</sup>

This in turn affects one's culpability, as guilt can be an indication of wrongful action, and therefore greater guilt can mean that the conduct is regarded as being more wrongful.<sup>1411</sup> By picturing

*'several people, each of whom choose to run an unjustifiable risk - say, by driving too fast down a street - but only one of whom actually causes harm ... the one who causes harm will feel an extra measure of guilt, despite the fact that his subjective assessment of the risk was no greater than those who escaped causing harm'.*<sup>1412</sup>

In terms of societal impact, cases where harm has occurred are also viewed more negatively and disapprovingly than where harm has not eventuated. Society has therefore conditioned its subjects to feel greater shame for committing crime, by way of societal disapproval.<sup>1413</sup> Brand-Ballard thus presents his view that in fact it is not because causing harm is more wrongful than not causing harm that it is viewed with more disdain, but rather it is the result of the social conditioning that people become accustomed to, that lead to feelings of guilt and shame when one has caused harm.<sup>1414</sup>

It is interesting to consider this in relation to the possession of offensive weapons. The intention in such circumstances may not involve the use of the weapon at all, and may merely be to carry the article in order to feel safer. On the contrary, it might also be intended for use to threaten somebody, or further to inflict an injury upon someone. However, in its most common form, although statistically challenging to prove, possession offences are likely to occur far more often than the causing of injury.

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<sup>1409</sup> This example draws upon the previous discussion in relation to forgotten possession in Chapter 3, (see page 146).

<sup>1410</sup> Miller states that '*guilt can be triggered by failure to abide by a norm we accept*'. W.I. Miller *The Anatomy of Disgust*, (Harvard University Press, Massachusetts, 1997), at 201.

<sup>1411</sup> J.Brand-Ballard 'Moral Emotions and Culpability for Resultant Harm' (2010-2011) 42 *Rutgers Law Journal* 315, at 322.

<sup>1412</sup> L.Alexander 'Crime and Culpability', *op cit* fn 400 at 8.

<sup>1413</sup> J.Brand-Ballard, *op cit* fn 1411 at 326.

<sup>1414</sup> *ibid* at 330.



Despite this diminished occurrence of harm, people who carry weapons should not get away with the crime of possession merely because they do not cause physical harm. It is due to the potential harms caused by weapons possession, that this is an area of activity that must be controlled.

As Robinson explains, despite merely creating the possibility of harm, '*punishment is imposed for intending to do harm or for creating a risk of harm*'.<sup>1415</sup> This argument is problematic for two reasons: first, it relates to a conditional event, and second, it raises the question whether thinking about doing something can be punishable. The conditional element is problematic because it is based on an unconfirmed, ambiguous event.<sup>1416</sup> There is a possibility that if the necessary conditions were present that the crime will be committed. Equally, if the conditions do not materialise, the intent will never be acted upon. This leads directly onto the second issue, that it is merely bad thoughts that have occurred, and no tangible crime. Bad thoughts on their own are not punishable, as they do not produce a wrong.

Regulation of thoughts would be impossible. Ensuring the certainty and foreseeability of the law would be unattainable, proving guilt would be futile, and the need for a proportionate punishment would be impractical. There is therefore a need for more than merely bad thoughts before punishment can be delivered. There must be evidence of some form of action, for example encouragement or assistance of a crime, a conspiracy, or an attempt. Conduct that causes a risk of harm must be addressed as it may in fact produce a different harm than that expected. Even if the action itself fails to cause the intended harm, it induces fear and apprehension of harm,<sup>1417</sup> which is a harm in itself,<sup>1418</sup> as evinced by the justifiability of defensive actions in self-

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<sup>1415</sup> P.H.Robinson 'A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability' (1975-1956) 23 *UCLA Law Review* 266, at 269.

<sup>1416</sup> It only becomes unconditional once the decision to act upon the intention has been reached. L.Alexander & K.D.Kessler 'Mens Rea and Inchoate Crimes' (1996-1997) 87 *Journal of Criminal Law & Criminology* 1138, at 1139.

<sup>1417</sup> This is a recognised harm, as indeed it satisfies the offence of assault - causing the victim to fear the infliction of unlawful force immediately. While the possession of offensive weapons in public places often occurs without coming to anyone's attention, on an occasion where it is noticed, or in an area with a high percentage of weapons carrying, it can cause this fear and apprehension of harm.

<sup>1418</sup> P.H.Robinson, *op cit* fn 1415 at 265.

defence. The balance to be achieved here is between the individual's liberty and protection of the public.<sup>1419</sup>

Cole questions the methods used for the determination of what should be proscribed under the criminal law and what falls outside its scope.<sup>1420</sup> He notes that minor gains such as merely avoiding harm is not enough to justify grave intrusions on a person's liberty; it may be necessary to show a potential deterrent effect as well.<sup>1421</sup> Cole draws attention to the fact that many criminal statutes proscribe activities that do not always lead to certain, material harm. It is argued here that the avoidance of harm is not a minor gain - it has a substantial benefit. Further, by prohibiting action, harm avoidance is not an isolated result as it is achieved hand in hand with deterring the criminal conduct, for example, the carrying of dangerous weapons. Consequently, there are some prohibited actions that do not necessarily cause harm in every instance, but by carrying an increased risk of harm,<sup>1422</sup> they provide a basis for their regulation.

An illustrative example is the imposition of speed limits to control and contain road traffic incidents, to oversee the tendencies of drivers to speed in certain areas, and to target places which are viewed as particularly dangerous due to the number of crashes and fatal incidents which have occurred there.<sup>1423</sup> This limits freedom on the roads, and exercises a degree of control over drivers in the hope that their conduct will be safer, and consequently that there will be a decreased risk of collisions. Cole raises a valid point, when he asks of such provisions '*why do we feel comfortable enforcing them even when no one is around to be struck?*'<sup>1424</sup> He notes that provisions which prohibit the possession of offensive weapons serve the same purpose: that of '*keeping weapons from the law-abiding as a means of keeping them from others*'.<sup>1425</sup> It is the possible level of public danger which justifies the imposition of such restrictions on liberty and of criminal liability if they are committed, as they involve significant risks

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<sup>1419</sup> See also the previous discussion in Chapter 3, section 3.2.4, on harm and offensive weapons.

<sup>1420</sup> K.Cole 'The Voodoo We Do: Harm, Impossibility, And The Reductionist Impulse' (1994) 5 *Journal of Contemporary Legal Issues* 31, at 37.

<sup>1421</sup> *ibid* at 37. Deterrence demonstrates the control function of criminal law in contrast with its retributive punishment function. N.Lacey 'Legal Constructions of Crime' *op cit* fn 111 at 183-184. Moore argues in favour of the retributive justice approach as the main role of criminal law. M.S.Moore 'Causation and Responsibility' (1999) 16(2) *Social Philosophy and Policy* 1, at 4.

<sup>1422</sup> K.Cole, *op cit* fn 1420 at 37.

<sup>1423</sup> L.Alexander 'Crime and Culpability', *op cit* fn 400 at 8.

<sup>1424</sup> K.Cole, *op cit* fn 1420 at 38.

<sup>1425</sup> *ibid*, at 38.

of societal, as well as individual, harm. As they do not interfere greatly with public or individual interests, the majority of people do not complain about their impositions, and happily comply with their requirements, be it keeping to a specific speed, or refraining from carrying weapons in public.

General compliance among the public with such prohibitions is not surprising, as most people do not have bad intentions. Namely, they are not law abiding citizens merely because of the law, rather, they would not act in the proscribed way even if it were lawful for them to do so. For example, most people do not feel the need to carry weapons, they do not have intent to use weapons against others, and do not object to the legal restrictions on doing so as it serves the purpose of targeting those who do possess such intentions. Feinberg has clarified that there may be a harm, and consequently ‘*an invasion of a legally protected interest ... although no injury is done*’.<sup>1426</sup> The regulation of offensive weapons falls within this statement, because the mere presence of offensive weapons on the street presents a risk of harm. Despite not leading to a physically injured victim, this in itself is a harm worth protecting against and proscribing by law.<sup>1427</sup>

This is the approach taken in the classification of inchoate offences, which refers to incomplete crimes. A person will be guilty of such crimes as soon as the necessary components have been satisfied, even if the full offence is not committed, or if the harm does not actually materialise.<sup>1428</sup> This category of offences includes ‘encouraging or assisting crime’ under sections 44-46 of the Serious Crime Act 2007; ‘attempt’ under section 1(1) of the Criminal Attempts Act 1981; and ‘conspiracy’.<sup>1429</sup> Perhaps the most well-known type of inchoate offence is attempt.<sup>1430</sup> An attempt requires not only intention to commit the relevant actus reus of the offence in

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<sup>1426</sup> J.Feinberg, *op cit* fn 58 at 106.

<sup>1427</sup> Again, see the previous discussion on harm and offensive weapons in Chapter 3, section 3.2.4.

<sup>1428</sup> J.Brand-Ballard, *op cit* fn 1411 at 317-318.

<sup>1429</sup> For a concise explanation of these offences, see the CPS, *Inchoate Offences*, <[http://www.cps.gov.uk/legal/h\\_to\\_k/inchoate\\_offences/](http://www.cps.gov.uk/legal/h_to_k/inchoate_offences/)> (accessed on 10/11/14). Significant debate has surrounded the offences of encouraging or assisting crime in recent years, which replaced the former offence of incitement. For a detailed discussion of these offences, see the Law Commission paper for a review of the law prior to the enactment of the Serious Crime Act of 2007. Law Commission, *Inchoate Liability for Assisting and Encouraging Crime*, (Law Com No 300, 2006).

<sup>1430</sup> L.Alexander & K.K.Ferzan ‘Danger: The Ethics of Preemptive Action’ (2011-2012) 9 *Ohio State Journal of Criminal Law* 637, at 644. The definition of attempt was discussed in Chapter 2, page 44. It requires evidence that an action has been taken that is more than merely preparatory to the commission of an offence (Section 1(1) of the Criminal Attempts Act 1981).

question, but also that steps be taken towards its completion, which are more than merely preparatory.<sup>1431</sup>

A full appreciation of the effect and scope of these offences is best gained by way of example. The most appropriate illustration is achieved by imagining a case involving different defendants who have the same intention to commit an identical crime, but only one succeeds in causing the harm. According to Cole, '*defendants should not be acquitted simply because they failed to cause harm. Two defendants who intended their acts to cause the same harm should receive the same punishment, even if one succeeded in bringing it about and the other failed*'.<sup>1432</sup> A comparison of two defendants is not required by law, but it affords an insight into the practical effect of the offence. Brand-Ballard suggests that the question to be asked is whether the causing of harm makes one offender more culpable than the other who has failed to cause the same harm.

It is necessary to assess whether the law should distinguish between these crimes, both involving guilty minds, yet only one produces the harm. This is similar to the example of the two labourers offered earlier<sup>1433</sup> and generally to offences of possessing weapons without using them to threaten or injure another person. It seems obvious that when harm occurs, it is more serious than when harm does not occur. But if the action is prohibited because of its potential harms, should committing the act without succeeding in producing the harm be considered less wrong? The law has developed by providing different punishments according to the gravity of the offences and harms that have occurred,<sup>1434</sup> and evidently, '*the world is full of instances in which equally culpable people wind up very differently*'.<sup>1435</sup> Thus, for example, the punishment for driving under the influence of alcohol, and causing a death, is greater than taking the same risk of driving under the influence of alcohol, without injuring anyone. '*Defendants who cause harm are punished more severely than those who*

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<sup>1431</sup> Section 1(1) of the Criminal Attempts Act 1981.

<sup>1432</sup> K.Cole, *op cit* fn 1420 at, at 31.

<sup>1433</sup> See page 287. The difference with labourer example offered earlier was that the possession was by way of forgetfulness, and not an intention to commit the same offence. However, it could be modified in such a way that both labourers deliberately carried their penknives with them for use in a fight, but only one of them meets their adversary during that evening, therefore, only one of them causes the intended harm.

<sup>1434</sup> A.H.Loewy, *op cit* fn 401 at 288.

<sup>1435</sup> *ibid*, at 290.

*merely attempt, or culpably risk, causing harm*'.<sup>1436</sup> It can therefore be concluded that causing a harm is more wrongful than attempting to cause a harm but failing to achieve the intended harm.<sup>1437</sup> Nevertheless, the failed attempt is also quite clearly a wrong, and thus inchoate offences are engaged to restrict potential harms, and punish culpable actors.<sup>1438</sup>

When considered with reference to the definition of attempt, which clearly requires steps to be taken towards the commission of the offence, it is evident that a wrongful intention alone is insufficient to give rise to culpability; there must be a corresponding action.<sup>1439</sup> If this is applied to cases involving offensive weapons, it can be said that the mere possession of an offensive weapon is less wrongful than using the article to inflict injury or death.<sup>1440</sup> The respective punishments will therefore differ according to the gravity of the offence. This makes sense as whenever serious harm has occurred it should be punished according to its detrimental consequences, whereas where a lesser harm has occurred, this should be considered when determining the punishment, which should be suitable to the crime. Punishment is of course one of the fundamental principles of criminal law,<sup>1441</sup> distinguishing the criminal law from other legal areas.

The intention of the actor is a pivotal consideration when assessing his unlawful actions, as well as their final consequences. The emotion of guilt is therefore a fundamental part of inchoate offences and possession offences, is experienced to varying degrees by different individuals following the negative consequences of their

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<sup>1436</sup> J.Brand-Ballard, *op cit* fn 1411 at 317-318.

<sup>1437</sup> *ibid* at 320.

<sup>1438</sup> K.K.Ferzan 'Inchoate Crimes at the Prevention/Punishment Divide' (2011) 48 *San Diego Law Review* 1273, at 1273.

<sup>1439</sup> L.Alexander & K.K.Ferzan, *op cit* fn 1430 at 647; K.K.Ferzan, *ibid* at 1274.

<sup>1440</sup> The case of *R v Jones* (1990) 3 All ER 886 at 891 is instructive of the series of actions leading up to 'more than merely preparatory' in an attempt. The defendant was charged with attempted murder. He had first purchased a shotgun and sawed off the end. These actions were considered to be merely preparatory. However, he then entered the victim's car with murderous intent, and threatened him by pointing the gun towards him. Although the safety catch remained on, this had satisfied the criteria of doing an action which is more than merely preparatory. He had come sufficiently close to committing the crime.

<sup>1441</sup> J.Hall *General Principles of Criminal Law*, (2<sup>nd</sup> edn, The Bobbs-Merrill Company Inc. New York, 2005), at 18. Hall explains that there are seven principles of criminal law: (i) the mens rea element; (ii) the actus reus element; (iii) the actus reus and mens rea coinciding; (iv) harm; (v) causation; (vi) punishment; and (vii) legality.

actions, and provides an explanation why punishment is deserved or required in connection with the type of harm that has ensued.

#### **6.1.8 Closing remarks on emotion**

It has been demonstrated in the course of this section that emotions can generate certain responses from individuals and that they can lead to specific crimes. Emotions can also be regarded as compulsive forces which take control of an individual's thought process, (the mechanistic conception), or that they can be morally evaluated, (the evaluative conception). Emotions can also play an important role within certain criminal law defences, fear in self-defence and duress, and anger also in loss of control, and can be influential in an individual's decision to carry an offensive weapon. It is therefore clear that emotion is closely connected to the field of criminal law and that '*it is both undesirable and impossible to exclude emotion from legal analysis*'.<sup>1442</sup>

While the law treats different emotions in different ways depending on the circumstances,<sup>1443</sup> and often expects a certain degree of control over emotions by individuals, '*the criminal courts and procedures are a prominent institutional space and institutional mechanism for emotions in society*'.<sup>1444</sup> Emotions cannot be completely separated from criminal action, and for the purposes of this research, most importantly, provide an understanding into the action taken in situations of self-defence and motivations behind weapons offences.

However, the law cannot allow all emotions to explain, justify or excuse criminal behaviour. As Kahan and Nussbaum explain, the law should not be suspicious of all emotions, but rather '*law should prefer emotions that express morally true valuations to emotions that express morally false ones ... so as to endorse ... an appropriately high valuation of the worth of all persons, even those who act wrongly*'.<sup>1445</sup> Applied to the case of self-defence, the law has achieved a good balance in this respect. It allows reasonable emotions, such as fear, which affect the individual in the

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<sup>1442</sup> T.A.Maroney, *op cit* fn 1292 at 122.

<sup>1443</sup> D.M.Kahan & M.C.Nussbaum, *op cit* fn 1289 at 272.

<sup>1444</sup> S.Karstedt 'Emotions and Criminal Justice', *op cit* fn 1367 at 300.

<sup>1445</sup> D.M.Kahan & M.C.Nussbaum, *op cit* fn 1289 at 331.

circumstances to be considered through its subjective element, but ensures fairness through the objective test of reasonable force, requiring necessity and proportionality to be adhered to. Similarly, there is some recognition within the interpretation of the statutory defences of good reason or reasonable excuse for weapons possession, that fear could potentially satisfy these defences.<sup>1446</sup> Nevertheless, as already discussed,<sup>1447</sup> fear alone will not be sufficient as there is usually a requirement for an attack to be imminent as well. This is also a necessary condition for fairness to restrict people who regularly deliberately expose themselves to risks from using fear as an excuse to permanently carry a weapon in public.

Thus, emotions are an intrinsic part of human behaviour and reaction, and can continue to shape people's choices and actions at all times.<sup>1448</sup> Emotions direct criminal action, and the law has designed a way to manage it within the scope of self-defence. Despite this apparent success, it is notable that the law employs a different approach to emotions within different defences. As has been shown, while emotion has a key role within loss of control, it has no direct role within self-defence and duress. Although the definitions and conditions of these defences present reasons why this is the case, it is arguably an inconsistent position. Reilly notes that this is partly due to the lack of standardised emotion theory within the criminal law, and that there is a call for clarification of the role of emotions and wider consistency across the board when considering matters of criminal liability.<sup>1449</sup>

While this is logical in terms of the assessment of emotions according to an objective standard within defences, including emotions as a direct component across the board could interfere with the accessibility of a defence. For example, while fear is likely to be naturally present in self-defence situations, it is not a necessary component of the defence. The action is considered lawful in the circumstances, due to the unlawful threat posed by the aggressor and the instinct to act in self-protection by the defender. The circumstances justify the action without need to consider the emotion. On the contrary, with loss of control, the circumstances alone are not excused; there must be

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<sup>1446</sup> As discussed in relation to the case of *R v Clancy* *op cit* fn 687.

<sup>1447</sup> See Chapter 3, section 3.4 for further discussion in relation to fear and offensive weapons.

<sup>1448</sup> E.Y.Drogin, *op cit* fn 1382 at 139.

<sup>1449</sup> A.Reilly 'The Heart of the Matter: Emotion in Criminal Defences' (1997-1998) 29 *Ottawa Law Review* 117, at 150-151.

a corresponding emotional explanation for the action taken. Therefore, it would be difficult to find a consistent approach across the board due to differences between defences. Nevertheless, agreement over a theory of emotions could prove beneficial in explaining the approaches to emotions within different defences.

As was noted earlier, emotions are not the only influence on the law in the context of self-defence and weapons offences. The field of the media can also be demanding on the law, steering calls for law reform, swaying public opinion and to some extent influencing the occurrence of crime. It is to this topic that the chapter turns in the following section.

## **6.2 The media**

The way in which self-defensive actions and offensive weapons are perceived in society can rely heavily on media representations. There are many different media forms which may shape public opinions and inform mass knowledge of events through their communication. While newspapers, and online and televised news reporting are the main mediums of concern to this research other forms will also be mentioned. The existence of so many different types of sources of information provides the potential to reach a greater understanding by representing the wider picture. What conventional sources miss or leave untold, non-conventional materials discuss and fill the voids. This section explores the relationship between media generated public perceptions about self-defence and offensive weapons. Further, the impact of media representations on fear of crime and the occurrence of crime is also considered. It will be argued that the media has the potential to perpetuate fear in relation to knife crime, accordingly shaping the belief that there is a need to carry a weapon, and also to influence policy decisions regarding the legal reform of self-defence.

Using news representations in this research provides valuable information, which may be missed by relying solely on legal texts and government publications. This thesis has been informed through many media outlets, benefitting in particular from the accessible nature of modern news reporting. The media is engaged in so far as it contributes towards the formation of public perception of crimes, (specifically knife



crime), of the victims and perpetrators, and of the role of defences, (namely, self-defence). These sources are useful in relation to both self-defence and knife crime. Regarding the former, self-defence cases always attract significant attention in the media and ignite public interest. As will become evident, news reports on the law and individual cases are often widely consumed and shape the public perception of self-defence. Regarding the latter, by examining such sources, an insight is also gained into the social issues surrounding knife crime, along with an idea of the location and age groups connected to these crimes, and also the nature of the attacks. These materials provide representations of the dynamics of knife crimes and an understanding of the impact such incidents have on the communities in which they occur.

Crime is a frequent focus of media attention and such representations are highly influential. There is a '*a complex intertextuality of media forms*',<sup>1450</sup> which include not only the news, but also films, dramas, documentaries, and advancements in modern technology have brought new forms such as social media, with a wide reach, instant communication and accessible nature. Mass media has a bad reputation for glamorizing criminal behaviour and '*stimulating unrealistic and irrational fears by exaggerating and sensationalizing the risks and seriousness of crimes*',<sup>1451</sup> however they are an invaluable source of information regarding wider social issues surrounding crimes, and therefore merit attention. There is therefore an evident tension here between the sensationalisation of subjects and the dissemination of information of public interest.

It is a truism to say that '*media portrayals of crime and violence have become part of the spectacle of everyday life*'.<sup>1452</sup> Programmes on criminal investigative procedures, real crime, and detective series further amplify the perception of danger, while the news informs the public of the occurrence of crimes and violence within our society, across the country and worldwide on a daily basis. Consequently, stories and representations have become almost unavoidable, and expected. Crimes of violence in

<sup>1450</sup> E.Carrabine et al. *Criminology: a Sociological Introduction*, *op cit* fn 1056 at 338.

<sup>1451</sup> R.Reiner S.Livingstone & J.Allen 'No More Happy Endings? the Media and Popular Concern About Crime Since the Second World War' in T.Hope & R.Sparks (eds), *Crime, Risk and Insecurity*, (Routledge, Abingdon, 2000), at 107.

<sup>1452</sup> D.Kidd-Hewitt 'Crime and the Media: A Criminological Perspective' in D.Kidd-Hewitt & R.Osborne (eds) *Crime and the Media: The Post-modern Spectacle*, (Pluto Press, London, 1995), at 1.

particular receive significant attention. Such incidents facilitate dramatic reports and attract wider audiences.<sup>1453</sup> Jewkes notes that such accounts are a common feature in the news and other media forms as ‘*violence fulfils the media’s desire to present dramatic events in the most graphic possible fashion*’.<sup>1454</sup> As well as facilitating the media to attract viewers or readers, crime, despite its often disturbing and frightening images, is a subject which engages the public.

Katz explains that people have become accustomed to emotionally disturbing content, which has become a regular feature in life.<sup>1455</sup> The media fulfil an important role in the distribution and dissemination of publicly relevant information about crime, and also the overall understanding of its impact within society. Despite claims that news reporting can be misleading and distort the real facts, Jewkes says that ‘*there is a valuable investigative tradition in journalism which continues to play an important role, not least in the spheres of crime control, crime prevention and uncovering police corruption and miscarriages of justice*’.<sup>1456</sup> This places responsibility on the media to communicate in a responsible manner. When considered within the context of weapons offences, these representations have the capacity to influence perceptions about carrying and the need for possession. Similarly, within the context of self-defence, representations can shape the public’s understanding of the law, and correspondingly fuel the misunderstanding of its unfairness.<sup>1457</sup>

First, the public’s fascination with crime will be discussed. Secondly, attention will be given to the techniques used by the media to portray their stories. Thirdly, the impact of the media will be assessed, including policy considerations and the blurring of the line between reality and representation. Finally, after gaining an understanding of these techniques and effects, the specific contexts of the reporting of knife crime, self-defence cases, and the portrayal of young people in the media will be evaluated.

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<sup>1453</sup> M.Peelo ‘Framing Homicide Narratives in Newspapers: Mediated Witness and the Construction of Virtual Victimhood’ (2006) 2 *Crime Media Culture* 159, at 169.

<sup>1454</sup> Y.Jewkes ‘The Construction of Crime News’ (2004) in C.Greer (ed), *Crime and Media: A Reader*, (Routledge, Abingdon, 2010), at 221.

<sup>1455</sup> J.Katz ‘What Makes Crime News?’ (1987) in C.Greer (ed), *Crime and Media: A Reader*, (Routledge, Abingdon, 2010), at 236.

<sup>1456</sup> Y.Jewkes ‘The Construction of Crime News’, *op cit* fn 1454 at 225.

<sup>1457</sup> The impact of the media on knife crime will be explored in section 6.2.4, and self-defence in section 6.2.5.

To understand the ability of the media to form and shape public perception with regard to these matters, it is necessary to gain insight into the relationship between the public and reporting of crime. For the media to have any effect<sup>1458</sup> there must be an underlying interest and desire to know among the public in relation to the incidence of crime.<sup>1459</sup>

### **6.2.1 Fascination with crime**

The relationship between crime and society is the subject of much discussion. Crime creates a sense of intrigue, and despite the often distressing or disturbing news communicated, there is a fascination to learn more about incidents and the people involved in them.<sup>1460</sup> It appears that this can be explained in part by the feelings that are generated, and the need to experience them. As Svendsen explains:

*‘Fear lends colour to the world. A world without fear would be deadly boring. Biochemically speaking, fear is related to curiosity, something that can be an important reason why exciting films and experiences are so entertaining. Novels, films and TV series designed to fill people with tension and fear are among the most popular’.*<sup>1461</sup>

This demonstrates the relevance of fear to crime news consumption, and the fact that a fear of the unknown and what has not been experienced underlies the attraction towards the subject. Fear has a binary relationship to the media as it drives the interest to discover, and is also triggered by the information communicated. People are driven by their *‘limited direct contact or experience with these matters and rely on media reports and representation of them for their knowledge’*.<sup>1462</sup> This is particularly true in relation to crimes of violence of the most serious nature as few will have endured such harms. Similarly, this is apparent with crimes involving knives, such as knife

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<sup>1458</sup> See section 6.2.3 for a discussion on the impact of media reporting generally.

<sup>1459</sup> This will be discussed in relation to both the public’s interest in knife crime (section 6.2.4) and the law of self-defence (section 6.2.5).

<sup>1460</sup> The psychology behind this trend would be interesting to explore, but is unfortunately beyond the scope of the present study.

<sup>1461</sup> L.A.Svendsen, *op cit* fn 1286 at 74.

<sup>1462</sup> P.Mason (ed) *Criminal Visions - Media Representations of Crime and Justice*, (Willan Publishing, Devon, 2003), at 4-5.

possession, as only a minority of the population, of young people especially, are directly affected.<sup>1463</sup>

Although fulfilling an important role of expanding public awareness, the fear and misrepresentations that can be generated, results in the impression that anyone can become a victim,<sup>1464</sup> and that everyone has a similar chance of becoming a victim.<sup>1465</sup> In order to attract the widest readership or viewers, the media establish a connection between the crime and the public, by painting the picture that single unconnected events are not just that, but in fact are a social problem that places everyone at an increased risk.<sup>1466</sup> This leads to a culture of fear, and a belief that anyone and everyone is at risk of danger.<sup>1467</sup>

Osborne claims that representations of crimes have almost become an obsession, particularly in relation to that which is broadcasted on television, in the news, dramas and real crime documentaries.<sup>1468</sup> It appears that this fascination with crime is a widely accepted feature of the media's relationship with the public. This relationship has developed as a means of reminding us all as members of society that the world is full of perils that may endanger us.<sup>1469</sup>

A risk created by the obsession with crime is that '*maintaining a distinction between 'fact' and 'fiction' is becoming increasingly difficult*'.<sup>1470</sup> This blurring of the line between reality and representation will be discussed shortly, and can be seen as a symptom of the techniques that are used to communicate certain messages. With a general interest in crime established, there are various methods employed by the media to affect and influence the consumer.

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<sup>1463</sup> B.Kinsella *Tackling Knife Crime Together - A Review of Local Anti-Knife Crime Projects*, *op cit* fn 553 at 6-7.

<sup>1464</sup> Consumers of the media naturally tend to relate to the victim of the story. J.Y.Kim 'The Rhetoric of Self-Defense', *op cit* fn 1161 at 265.

<sup>1465</sup> P.Mason (ed), *op cit* fn 1462 at 27.

<sup>1466</sup> L.A.Svendsen, *op cit* fn 1286 at 55.

<sup>1467</sup> *ibid* at 48 and 50.

<sup>1468</sup> R.Osborne 'Crime and the Media: From Media Studies to Post-modernism' in D.Kidd-Hewitt & R.Osborne (eds) *Crime and the Media: The Post-modern Spectacle*, (Pluto Press, London, 1995) at 29.

<sup>1469</sup> L.A.Svendsen, *op cit* fn 1286 at 14.

<sup>1470</sup> E.Carrabine et al. *Criminology: a Sociological Introduction*, *op cit* fn 1056 at 331-332.

### **6.2.2 Techniques used by the media**

One successful technique used by the news media to attract audiences and induce certain responses, is the use of repetition. *‘Repetition is one of the key techniques that turns homicide stories into ‘mega’ stories, both repetition around the time of the case and its trial and, in some cases, repetition over many years’.*<sup>1471</sup> The more a story appears in the news the more memorable it becomes and the greater impact it has within society. This will be seen shortly with the murder of Phillip Lawrence in the section discussing knife crime. The more serious the crime, the more attention it will receive. This is evident in the over-reporting of violent crime, which makes it seem as though it occurs far more regularly than it does in reality. As well as violent crimes, individual cases will be widely reported if they are extraordinary: *‘unusual and sensational crime stories occupy a disproportionate amount of time and space in both local and national news’.*<sup>1472</sup> The more sensational the crime story, the more attention it will be given, as the saying goes ‘bad news sells’. People are not interested in hearing about mundane stories,<sup>1473</sup> and all news media is guilty of highlighting negative facts.<sup>1474</sup> This deduction can be explained simply by the sense of moral repulsion and disbelief that accompanies a serious and unusually violent attack, as it offends against the notion that people can peacefully live alongside each other in a safe, civilised society. In turn, this strengthens the debate in relation to self-defence, as it makes people more aware and fearful of potential dangers. Accordingly, there is an increase in the belief that there is a need for a generous legal approach to self-defence.<sup>1475</sup>

As well as repetition and over-reporting of violent crime, another technique used by the media is the reference to the location at which the crime occurred. Crime occurs most frequently in large inner cities. It is common to hear of knife crimes, for

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<sup>1471</sup> M.Peelo, *op cit* fn 1453 at 162.

<sup>1472</sup> A.Wallace ‘Things Like That Don’t Happen Around Here: Crime, Place and Real Estate in the News’ (2008) 4 *Crime Media Culture* 395, at 396.

<sup>1473</sup> J.Ditton et al. ‘From Imitation to Intimidation: A Note on the Curious and Changing Relationship between the Media, Crime and Fear of Crime’ (2004) 44 *British Journal of Criminology* 595, at 595.

<sup>1474</sup> I.Marsh & G.Melville ‘The Media, Criminals and Criminal Communities’ (2010) 79 *Criminal Justice Matters* 8, at 8.

<sup>1475</sup> R.L.Lerner, *op cit* fn 256 at 333-334.

example, in London.<sup>1476</sup> Interestingly, when a crime takes place in rural areas, this immediately sparks substantial media interest and coverage as it is unusual, and breaks preconceptions about the safety of living in the countryside. It has an added shock factor and becomes a central part of the story. As Wallace claims, ‘*The picturesque and the scenic are held up as immunizing features and preventative agents against the forces of evil*’,<sup>1477</sup> and in order to produce added impact, the geographical location is explained in terms of its distance from the nearest big city, and in terms of its peaceful, idyllic location.<sup>1478</sup>

The abduction and murder of ten-year-olds Holly Wells and Jessica Chapman in 2002 are an example of media reporting which emphasised the unlikely nature of the location. Similarly, the abduction and murder of 5-year-old April Jones from outside her home in Machynlleth (West Wales) in October 2012 was the first case of its kind in the area.<sup>1479</sup> Veigh reports that ‘*although such crimes are reacted to with outrage and anger wherever they occur, the fact that they have occurred in rural areas or villages, with their sleepy, idealised images, adds an extra, almost sensationalised, element to the way that they are reported in the media*’.<sup>1480</sup> This reflects the way in which the news hones in on the location of the crime in order to impact the public reaction.<sup>1481</sup> Indeed, the same focus on the rurality of the location is evident in Anthony Martin’s case,<sup>1482</sup> which raised discussions not only on self-defence, but also on rural crime.<sup>1483</sup>

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<sup>1476</sup> D.Hill ‘London Knife Crime: Less ‘Tough’ Talk and More Thinking Might Help’, *op cit* fn 499; J.Doward ‘Fatal Stabbing of London Teenager Adds to Fears Over Gang-related Knife Crime’, (*The Guardian*, 27 March 2010), <<http://www.guardian.co.uk/uk/2010/mar/27/knife-stabbing-godwin-lawson-gangs>> (accessed on 07/06/10); J.Adetunji ‘Youth Stabbed to Death Outside London Tube Station’, (*The Guardian*, 9 May 2010), <<http://www.theguardian.com/uk/2010/may/09/fatal-stabbing-finsbury-park-tube>> (accessed on 07/06/10).

<sup>1477</sup> A.Wallace, *op cit* fn 1472 at 401.

<sup>1478</sup> I.Marsh & G.Melville ‘The Media, Criminals and Criminal Communities’, *op cit* fn 1474 at 9.

<sup>1479</sup> For details about the conviction of Mark Bridger for these offences, see the sentencing remarks of Mr Justice Griffith Williams in *R v Mark Bridger*, Mold Crown Court, 30 May 2013, available at the Courts and Tribunals Judiciary; Judgments, <<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/mark-bridger-sentencing-remarks-30052013.pdf>> (accessed on 05/02/15).

<sup>1480</sup> I.Marsh & G.Melville ‘The Media, Criminals and Criminal Communities’, *op cit* fn 1474 at 9.

<sup>1481</sup> News accounts are unquestionably interesting to this research, but must be approached with caution as they often distort facts and have hidden political agendas.

<sup>1482</sup> *R v Martin*, *op cit* fn 59.

<sup>1483</sup> BBC News, ‘Tony Martin: Crime and Controversy’, *op cit* fn 1032.

Another technique used is the use of emotionally charged language.<sup>1484</sup> Examples of the emotive language in headlines include ‘*Parents distraught after 16-year-old son stabbed to death*’,<sup>1485</sup> and ‘*Fatal stabbing of London teenager adds to fears over gang-related knife crime*’.<sup>1486</sup> This demonstrates the common emphasis upon the age of victims, the method of killing and the weapons culture of youth. The use of emotive language not only appeals to the reader’s empathy, but also enables the reader to appreciate the victim’s suffering and fear, as well as feel horrified at the evil of the perpetrator.<sup>1487</sup>

Another technique is the choice of photographs shown on the screen or accompanying the text in the newspapers, which makes crimes ‘real’ to the audience. The photographs that accompany such stories also evoke emotion; usually of flowers or policemen at the scene of the crime, or of the victim. Furthermore, with the advancements of technology, online news stories and televised broadcasts often include amateur film clips from witnesses with smartphones, and social media also permits a live timeline and amplifies reporting of incidents.<sup>1488</sup> This use of modern technology is especially pertinent with incidents of weapons attacks. For example, video clips were immediately circulated following the brutal murder of 25-year-old fusilier Lee Rigby in Woolwich using meat cleavers and a total of eight knives.<sup>1489</sup>

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<sup>1484</sup> P.Squires et al. *Street Weapons Commission: Guns, Knives and Street Violence*, *op cit* fn 557 at 105.

<sup>1485</sup> K.McVeigh ‘Parents Distraught After 16-year-old Son Stabbed to Death’, (*The Guardian*, 6 May 2010), <<http://www.theguardian.com/uk/2010/may/06/teenager-stabbed-killed-london>> (accessed on 07/06/10).

<sup>1486</sup> J.Doward ‘Fatal Stabbing of London Teenager Adds to Fears Over Gang-related Knife Crime’, (*The Guardian*, 27 March 2010), <<http://www.guardian.co.uk/uk/2010/mar/27/knife-stabbing-godwin-lawson-gangs>> (accessed on 07/06/10).

<sup>1487</sup> P.Mason (ed), *op cit* fn 1462 at 27.

<sup>1488</sup> For example, consider the live broadcasting of the police operation following the terror attacks on the offices of satirical magazine Charlie Hebdo in Paris in January 2015, and the videos taken by onlookers of the initial attacks.

<sup>1489</sup> *R v Adebolajo and another* [2014] EWCA Crim 2779. This case was highly publicised due to its gruesome and barbaric nature, and the extremist motives and messages of the attackers. The case shows that there are many different motivations behind crime involving knives, and not all violence involving knives revolve around gang activity. Further causes may relate to mental illness and intoxication. See P.Squires et al. *Street Weapons Commission: Guns, Knives and Street Violence*, *op cit* fn 557 at 23. Further discussion on the impact of the media on the incidence of crime, knife crime in particular, will be provided in sections 6.2.4 and 6.2.5.

In addition to these techniques, news reports focus on particular cases without contextualizing the wider trends in offending for the crime in question.<sup>1490</sup> This is often the situation with the reporting of knife crime incidents, commonly referring to other recent cases to suggest a crisis. The incident is therefore perceived as a more frightening event.<sup>1491</sup>

Respondents in a study by Ditton stated that the reporting of crime on the news was something they viewed as being distant,<sup>1492</sup> as something that is shown on television that they had no real connection to or experience of,<sup>1493</sup> but there was a concern that this gave the impression that crime was on the rise. One seventeen-year-old man who was interviewed stated that crime is something that we hear about more and more, as if the incidents are now occurring far more regularly.<sup>1494</sup> Another individual interviewed, a seventy-four-year-old woman, also claimed that it was happening more often, from her interpretation of the news. She pivotally states that '*the world's getting worse. People are not as nice as they used to be. I don't know why they've changed*'.<sup>1495</sup> Jewkes suggests that there is a danger in this type of reporting which leads to such views, as it can be misleading. She notes in particular the tendency to ignore real victimization patterns by the media which '*persist in presenting a picture of serious crime as random, meaningless, unpredictable and ready to strike anyone at any time*'.<sup>1496</sup> According to crime surveys the reality is that crime is generally declining, not rising.<sup>1497</sup>

Thus, the news has devised many techniques in order to capture the attention of the public, in order to inform them of important events and occurrences of crimes. The impact of the news is therefore visibly obvious and extensive in society, and provides vital communication to the public. The techniques that have been discussed, namely, repetition; the emphasis on the location; the use of photographs; and the lack of

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<sup>1490</sup> A notable example includes the case of *R v Bowling (Jonathan Leslie)* [2014] EWCA Crim 462, involving the murder of 68 year old church organist Alan Greaves on Christmas Eve in Sheffield with a pickaxe. This was a severe isolated incident and was highly publicised for its timing, the weapon used, and the unprovoked nature of the attack.

<sup>1491</sup> P.Mason (ed), *op cit* fn 1462 at 16.

<sup>1492</sup> J.Ditton et al. *op cit* fn 1473 at 604.

<sup>1493</sup> *ibid* at 603.

<sup>1494</sup> *ibid* at 604.

<sup>1495</sup> *ibid* at 605.

<sup>1496</sup> Y.Jewkes 'The Construction of Crime News', *op cit* fn 1454 at 217.

<sup>1497</sup> See the discussion on the Crime Survey for England and Wales in section 3.1.1, and on page 192.



context provided, are all evident in relation to crimes involving offensive weapons or bladed articles, and also self-defence. The media reporting of these offences and the defence can create a lasting impression on the public. Therefore, it is necessary to consider the impact of crime news, both generally, and within the specific contexts of knife crime and self-defence.

### **6.2.3 The impact of media reporting**

The potential influences of the media that are considered here are its effect on crime commission, and the shaping of public perception and fear of crime. There has been substantial debate over the impact of media representations of crime and despite a search for a direct correlation between the representation and the commission of crimes, or the fear of crime level, studies have failed to prove a significant relationship between the media and crime.<sup>1498</sup> However, considering the large amount of crime content in the news and other media forms, there are real and valid reasons to be concerned about the possible effects media violence might have on its consumers.<sup>1499</sup>

Exposure to criminal representations can induce desensitisation which could lead to crime commission or cause alarm about the regularity of crime. Witnessing crime or violence can desensitise an individual and make them more likely to react in the same way in the future. This is true in relation to knife crime where people witness the injuries sustained by others and decide to carry a weapon in case they become the victim in the future.<sup>1500</sup> Although the impact of media representations might be less strong than witnessing violence in person, it has the potential to cause the same perception about crime and the need for action, and irresponsible reporting will have a

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<sup>1498</sup> Gauntlett suggests that the lack of correlation indicates one of two things: either that there is indeed no positive correlation between the media and criminal behaviour; or alternatively, that the research undertaken in this context has taken the wrong path in addressing the issue. D.Gauntlett 'Ten Things Wrong with the Media 'Effects' Model' in C.K.Weaver & C.Carter (eds) *Critical Readings: Violence and the Media*, (Open University Press, Maidenhead, 2006), at 54; and J.Ditton et al. *op cit* fn 1473 at 595. See also the discussion on following page.

<sup>1499</sup> M.E.Perse *Media Effects and Society*, (Lawrence Erlbaum Associates Publishers, Mahwah, 2001), at 198.

<sup>1500</sup> S.Antrobus (chairman), *Breakthrough Britain: Dying to Belong*, *op cit* fn 558 at 54.

wider reach, which could impact upon more individual decisions to carry weapons.

<sup>1501</sup>

Despite the reasonable foundations for concern over media effects, Ditton reports that '*an actual relationship has been discovered surprisingly infrequently*'.<sup>1502</sup> This may come as a surprise as people naturally have instinctive reactions of unease and fear when they view and read about violent crime in the news. There is certainly a common presumption that crime in the media does have significant effects and therefore influences the public's perception of the world.<sup>1503</sup> Perse explains that despite the understandable expectation of a connection between the media and crime commission, '*it is clearly simplistic and misleading to hold that violent themes in popular music, movies, comic books, or television might be the major cause for delinquency and the violent crime rate*'.<sup>1504</sup> Perse suggests that the tendency to pursue a connection between the two is easier than facing the true causes of crime, such as poverty - a greater social problem and a more sensitive area for political debate.<sup>1505</sup> This view is supported by Furedi, who explains that the media do not cause society's risk perception, but rather, merely augment it: '*the media's preoccupation with risk is a symptom of the problem and not its cause*'.<sup>1506</sup> It appears that the media influence public perception but apparently not the incidence of crime.

It is possible that other forms of representation such as violent computer games and films have the potential to distance a person's sense of reality to the point of being unrecognisable.<sup>1507</sup> This might indeed cause particularly susceptible and vulnerable individuals, perhaps with a predisposition towards violence, to lose the ability to consider the consequences of their actions in real-life, and to consider violence

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<sup>1501</sup> *ibid* at 68-69.

<sup>1502</sup> J.Ditton et al. *op cit* fn 1473 at 595.

<sup>1503</sup> M.E.Perse, *op cit* fn 1499 at 3.

<sup>1504</sup> *ibid* at 5.

<sup>1505</sup> *ibid*.

<sup>1506</sup> F.Furedi, *op cit* fn 1325 at 60.

<sup>1507</sup> A full investigation of this question is beyond the scope of this thesis. However, a research study has indicated a correlation between aggression and violent media, see J.Von Radowitz 'Study Finds that Violent Video Games May be Linked to Aggressive Behaviour', (*The Independent*, 17 August 2015), <<http://www.independent.co.uk/news/science/study-finds-that-violent-video-games-may-be-linked-to-aggressive-behaviour-10458614.html>> (accessed on 17/08/15).

towards others as being acceptable.<sup>1508</sup> There is insufficient evidence to confirm a directly positive correlation, and further research is required in this area as the speed of development of new technology may change the criminological understanding of copycat crime.<sup>1509</sup> For the purposes of the present research, it is not possible to draw a general conclusion that violent video games or films are responsible for the occurrence of crime, as they do not influence most people negatively.<sup>1510</sup> However, it is reasonable to observe that they may be influential upon some individuals,<sup>1511</sup> and may be a contributing factor in their commission of crimes.<sup>1512</sup>

Despite the fact that a significant correlation has not been proven, there are ways in which the media can, and do influence public opinions, especially about crimes. One way in which the media does affect the public is through their opinion and attitudes towards violence. It is suggested that violent media content, for example in computer games,<sup>1513</sup> has an impact by over-exposing people to crime and making them more accepting of crime as a societal norm.<sup>1514</sup> Consequently, people respond to the representations by becoming desensitised to the severity of crime, and are less easily

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<sup>1508</sup> There have been cases where evidence has been provided that violent video games caused the defendant to brutally murder another. For example, 17-year-old Warren Leblanc committed murder due to his obsession with the game *Manhunt*. Many retailers refused to sell the game following the incident in 2004. This is an unreported case from Leicester Crown Court but see the following news reports for information: *Sky News*, 'Stabbing Murder: Video Game Pulled', (29 July 2004), <<http://news.sky.com/story/280791/stabbing-murder-video-game-pulled>> (accessed on 24/05/15); C.Blackstock 'Killing 'Incited by Video Game': Parents of Murdered Teenager Call For Ban', 29 July 2004, <<http://www.theguardian.com/uk/2004/jul/29/ukcrime.colinblackstock>> (accessed on 24/05/15).

<sup>1509</sup> For a useful overview and discussion, see for example J.B.Helfgott *Criminal Behavior: Theories, Typologies and Criminal Justice*, (Sage Publications, Seattle, 2008), at 371. Helfgott observes that there are a number of variables that contribute to a person's decision to commit a crime, and highlights the difficulties involved when assessing the role of technology in crime (at 368-370).

<sup>1510</sup> The same is true in relation to the influence of poverty on crime, as '*While there is a correlation between crime and poverty, it does not establish a causal link*'. M.Bagaric 'Rich Offender, Poor Offender: why it (Sometimes) Matters in Sentencing', *op cit* fn 301 at 16.

<sup>1511</sup> See fn 1508 above for an example.

<sup>1512</sup> This ties into the discussion on emotions at section 6.1 of this chapter, as it is suggested here that this demonstrates the expectation upon individuals to operate a degree of control over their decisions and emotions. See K.W.Simons 'Self-defense: Reasonable Beliefs or Reasonable Self-control?', *op cit* fn 444 at 56.

<sup>1513</sup> The Government Reply to the Seventh Report from the Home Affairs Committee Session 2008-09 HC 112, *Knife Crime*, (2009), at 9. According to this report '*... violent DVDs and video games exert a negative influence on those who watch and play them. Watching or playing such media contributes around 10% of any person's predisposition to be violent. Of particular concern is their influence on individuals who are already predisposed to violence because they grew up in a violent environment*'. A report by the World Health Organization came to the same conclusion. Drawing upon one hundred and thirty studies, for violent video games where interaction is a strong characteristic, there was evidence of a '*causal risk factor for increased aggressive behavior, aggressive cognition and aggressive affect and for decreased empathy and prosocial behaviour*'. D.Sethi et al (eds), *op cit* fn 495 at 41.

<sup>1514</sup> M.E.Perse, *op cit* fn 1499 at 208.

shocked by its occurrence and consequences. This result is related to the blurring of the line between fact and fiction, where an individual becomes detached from the reality of his actions. Thus the media does have some undeniable effects - the very objective is to relay information to the public and shape their understanding of contemporary matters.<sup>1515</sup>

Another way in which media representations certainly have an impact is through the feelings that they induce within individuals. *'The devices of 'mediated witness',<sup>1516</sup> stir us emotionally as readers and as viewers and, thereby, cause us to feel more fully involved in the actual event',<sup>1517</sup>* by nurturing a sense of outrage from the portrayal that the experiences could be directed towards anyone. Mediated messages are influential to the process of understanding and perception of criminal activity, and provide an interpretation of events to assist readers in their own decoding of the story.<sup>1518</sup> A sense of closeness to the crime is harbored through the reporting techniques, creating a link between the audience, the incident, and its victim. Bourke claims that:

*'the routine portrayal of violent death in the mass media has blunted sensibilities: when hearing about real-life viciousness we may feel pity or distaste, but when we identify the emotion of fear it is our fear that concerns us. It is the fear of something that may befall us, rather than fear for others'.<sup>1519</sup>*

Therefore, she clearly believes that a sense of fear can be developed by media exposure. This is the view taken in this research, namely, that media representations can induce fear among society.<sup>1520</sup>

A typical example of this fear produced from criminal representations in the media is *Crimewatch UK*.<sup>1521</sup> The programme is intended as a means of solving crimes through

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<sup>1515</sup> E.Carrabine et al. *Criminology: a Sociological Introduction*, op cit fn 1056 at 333.

<sup>1516</sup> This term refers to the experience of witnessing a crime by virtue of its media representation. Namely, for consumers of the news, although they are not directly affected by the story, mediated witness induces feelings of personal connection to the crime committed.

<sup>1517</sup> M.Peele, op cit fn 1453 at 164.

<sup>1518</sup> *ibid* at 164.

<sup>1519</sup> J.Bourke, op cit fn 1298 at x in the preface.

<sup>1520</sup> The relevance of emotion was discussed in section 6.1 of the present chapter.

<sup>1521</sup> In relation to depictions of 'real crimes' on television, also known as 'reality TV', the blurring of fact and fiction is pertinent. *'We have become voyeurs of 'factual' programmes that 'entertain' and*

the reconstruction of events, in the hope that the audience will have information of relevance which could help the criminal investigation. The reconstructions shown in the programme are often terrifying, and it is therefore attributed the blame for significant fear of crime among its viewers.<sup>1522</sup>

Indeed, the media have been accused of sensationalizing crime and deviance,<sup>1523</sup> increasing fear through their exaggerations of serious crime. Marsh and Melville have looked at the impact of the media within the specific context of Chicago.<sup>1524</sup> They note that while the crime rate was in decline and far lower than other states, the stereotype that had been persistently presented in the media of the city resulted in its perception as a city of crime and violence.<sup>1525</sup> *'The power of media ... lies in its pervasiveness and its ability to cultivate a general view of reality over time'*.<sup>1526</sup>

The habit of stereotyping within the media has significant consequences on public opinion of crime, which is consequently misunderstood and incorrect.<sup>1527</sup> Public perception is shaped by these representations whether they are realistic or distorted. This is partly responsible for the belief that the law of self-defence is unfair, and the calls for extending the law ever more in favour of householders. The media can also be responsible for moral panic<sup>1528</sup> across society, as it feeds a sense of fear in relation to a specific phenomenon which becomes the focus of debate and concern.<sup>1529</sup> The term describes fear of crime by the public in relation to certain offensive behavior which is perceived as a significant threat to society.<sup>1530</sup> Notably, the fear and perception of threat is usually disproportionate to the real threat posed by the

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*frighten us'*. D.Kidd-Hewitt & R.Osborne (eds) *Crime and the Media: The Post-modern Spectacle*, (Pluto Press, London, 1995), at 1.

<sup>1522</sup> P.Mason (ed), *op cit* fn 1462 at 20.

<sup>1523</sup> R.Reiner S.Livingstone & J.Allen, *op cit* fn 1451 at 107.

<sup>1524</sup> I.Marsh & G.Melville 'The Media, Criminals and Criminal Communities', *op cit* fn 1474 at 8.

<sup>1525</sup> *ibid.*

<sup>1526</sup> J.Kitzinger 'The Debate about Media Influence' (2004) in C.Greer (ed), *Crime and Media: A Reader*, (Routledge, Abingdon, 2010), at 166-167.

<sup>1527</sup> Y.Jewkes *Media and Crime*, (Sage Publications, London, 2006), at 141.

<sup>1528</sup> See page 106 for a definition of this term.

<sup>1529</sup> S.Cohen 'Folk Devils and Moral Panics: The Creation of the Mods and Rockers (1972-2002)' in C.Greer (ed), *Crime and Media: A Reader*, (Routledge, Abingdon, 2010), at 462.

<sup>1530</sup> J.Schildkraut H.J.Elsass & M.C.Stafford 'Could it Happen Here? Moral Panic, School Shootings, and Fear of Crime Among College Students', 63 *Crime and Social Change* 91, 2015, at 91.

phenomenon.<sup>1531</sup> This is evident in the panic relating to young people, gangs and the carrying of offensive weapons in public.

Young people are regularly the focus of news stories about violence and serious crimes. However, they do not only feature in the news media, they also become the subjects of other media forms, such as televised dramas and documentaries. These representations also impact upon the activities of young people, as it is said that global media is one influence that '*forms part of the context within which young people negotiate their identities, meanings and relative autonomy*'.<sup>1532</sup> Youth culture draws upon many media forms, and can be influenced by the portrayals in these mediums, for example, the need to carry a weapon for protection.<sup>1533</sup>

It is therefore notable that crime is a common feature of television dramas, as this could be shaping the actions of young people. Knives as threatening weapons make regular appearances and reappearances, on programs such as *NCIS*, *Criminal Minds* and *CSI*. These shows provide entertainment to viewers and excitement through the provision of intellectual puzzles, allowing the tracing of crime stories from beginning to end and the visualization of criminal procedures. Viewers are given a sense of justice when retribution is enacted at the end of the episode,<sup>1534</sup> and it has been asserted that another reason people like to watch crime dramas is to re-create '*daily their moral sensibilities through shock and impulses of outrage*'.<sup>1535</sup> They have an educational value despite being slightly unrealistic as the criminal is usually found, convicted and prosecuted which does not always happen in real life. However, this is a matter of what makes good viewing and gets good ratings, and after watching horrifying events people like to see happy endings in order to maintain their hope and faith in humanity.<sup>1536</sup> Brown explains that television is a means of providing solutions for audiences, despite sometimes being contrived. It serves the purpose of ensuring that people do not become too cynical and full of despair about the state of the world.

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<sup>1531</sup> As seen, for example, in relation to school shootings. Media reporting of such incidents contributes to an increase in fear, which is far greater than the real threat posed by such attacks. *ibid*, at 93, and 96-97.

<sup>1532</sup> A.Silvestri et al. *op cit* fn 564 at 34.

<sup>1533</sup> *ibid* at 35.

<sup>1534</sup> S.Brown *Crime and Law in Media Culture*, (Open University Press, Buckingham, 2003), at 32.

<sup>1535</sup> J.Katz 'What Makes Crime News?', *op cit* fn 1455 at 232.

<sup>1536</sup> S.Brown *Crime and Law in Media Culture*, *op cit* 1534 at 32.

The role of retribution in crime dramas is important to bring entertainment and enjoyment to the viewers.<sup>1537</sup>

Watching televised and cinematic representations of crimes with the added element of characters which the viewers can relate to, often become the reality to many, so that they consider these to be the truth. *'We can no longer rely on a stable relationship or clear distinction between a 'real' event and its mediated representation. Consequently we can no longer work with the idea that the 'real' is more important, significant, or even 'true' than the representation'*.<sup>1538</sup> The line between fact and fiction is becoming increasingly less defined. Carrabine also makes this point that distinguishing between the social reality and the media representations and images is almost impossible.<sup>1539</sup> It has been said that *'mediatised images or simulations of reality become more meaningful and relevant, more perfect, more 'real' to people than the physical reality that surrounds them'*.<sup>1540</sup> This reflects the strength of the media's ability to create dominating stereotypes that prevail over reality.

#### **6.2.4 Media representations of knife crime**

Knife crimes repeatedly hold a prominent place in media representations. Reports about incidents involving knives increase the perception of their occurrence. Due to the general nature of knives as easily accessible articles, this could have a detrimental effect by encouraging weapons possession. This matter was perhaps first thrown into the spotlight when Stephen Lawrence was murdered in 1993 in a racially motivated attack. His case has frequently been referred to since, and has been the subject of extensive inquiries into the handling of the case, with allegations of gross failures and institutional racism within the police.<sup>1541</sup> Two of the original five men accused of his murder were finally convicted and jailed in 2012.<sup>1542</sup>

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<sup>1537</sup> *ibid* at 32.

<sup>1538</sup> *ibid* at 35.

<sup>1539</sup> E.Carrabine et al. *Criminology: a Sociological Introduction*, *op cit* fn 1056 at 332.

<sup>1540</sup> K.Franko Aas 'Beyond 'The Desert of the Real': Crime Control in a Virtual(ised) Reality' (2006) in C.Greer (ed), *Crime and Media: A Reader*, (Routledge, Abingdon, 2010), at 563.

<sup>1541</sup> BBC News, 'Stephen Lawrence Murder: A Timeline of How the Story Unfolded', (6 March 2014), <<http://www.bbc.co.uk/news/uk-26465916>> (accessed on 16/08/15).

<sup>1542</sup> *R v Dobson* [2011] EWCA Crim 1255.

The issue arose again when Phillip Lawrence was murdered in London in 1995. The headmaster was stabbed by a 15-year old boy who was a part of a gang preparing to attack pupils at the school.<sup>1543</sup> The case was subject to nationwide media reporting at the time, and remains to be a case of reference in contemporary crimes when knife killings occur. For example, *The Observer* reporting on the murder of 15 year old Zac Olumegbon in 2010, referred to the murder of Phillip Lawrence as one of the most high profile knife crimes in Britain.<sup>1544</sup> As Peelo notes ‘*after Phillip Lawrence’s death there was much media debate around morality in contemporary society and a campaign was set up to ban knives ... Hence, the tragedy of one person’s brutal killing becomes strangely depersonalized and held to represent a mass of social discontent*’.<sup>1545</sup> Both the Lawrence cases have become a symbol of the danger these crimes presents.

The immediate response was widespread debate concerning young people carrying knives; the problems of street gangs fighting; the presence of knives in schools; as well as campaigns against the carrying of knives, and the introduction of amnesties whereby knives could be handed in to the police.<sup>1546</sup> Such approaches offer only short-term solutions. While amnesties may succeed in removing a large amount of knives from the streets with immediate effect, it is not effective in the long-term. The reason for this is that the underlying causes of weapons carrying remain present, therefore until they are addressed, these knives will simply be replaced with others.<sup>1547</sup> In the immediate aftermath, there was an urgent sense that actions had to be taken to tackle this growing problem, and the media gave the public a voice for their fears to be heard and for actions to be demanded.<sup>1548</sup>

As well as providing such a platform for discussion, the news is a source of information about knife crime,<sup>1549</sup> as it cross-references other similar crimes, providing an historical account as well. Both newspapers and news broadcasts pay

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<sup>1543</sup> *Re Chindamo (tariff recommendation)* [2001] All ER (D) 08 (Nov).

<sup>1544</sup> M.Townsend ‘Can the War on Teenage Knife Crime Ever be Won?’ (*The Observer*, 18 July 2010).

<sup>1545</sup> M.Peelo, *op cit* fn 1453 at 166.

<sup>1546</sup> C.Eades et al. ‘Knife Crime’ A Review of Evidence and Policy, *op cit* fn 495 at 27-28.

<sup>1547</sup> Strategies to address these problems were discussed in Chapter 3, at section 3.7.

<sup>1548</sup> M.Peelo, *op cit* fn 1453 at 167.

<sup>1549</sup> For example, see T.Beleaga ‘London Knife Crime: How Bad Is It?’, (*The Guardian*, 12 April 2012), <<http://www.theguardian.com/uk/datablog/2012/apr/12/london-knife-crime>> (accessed on 08/05/12).



significant attention to the phenomena of ‘knife crime’ and have a great impact on the public perception and understanding of these crimes. Crime is a recurring theme of newsworthiness, and as Jewkes states, ‘every day newspaper headlines scream for our attention with stories about crime designed to shock, frighten, titillate and entertain’.<sup>1550</sup> Crime news often reports single incidents and specific cases giving the victims a focal part in the stories, which results in a strong effect on the readers or viewers. Some examples which prove this statement are the following headlines: ‘Knife crime rises fast as muggers target gadgets’;<sup>1551</sup> ‘Boy, 16, stabbed to death in south-east London’;<sup>1552</sup> ‘Boy, 14, stabbed in neck in Coventry’;<sup>1553</sup> ‘Boy, 16, knifed in takeaway gang attack’.<sup>1554</sup> A notable feature of several of these headlines is the young age of the victim, which induces greater reactions. Thus, the ‘possible role of media amplification in reinforcing a sense of fear seems an area worth exploring, especially in relation to the carrying of knives’.<sup>1555</sup>

In assessing the potential impact of the media on incidents of crimes involving knives, research conducted by the Centre for Crime and Justice Studies has questioned the use of the term ‘knife crime’, claiming that although it is ‘an expression commonly used by politicians and the media’,<sup>1556</sup> it can be misleading and unclear what exactly it refers to.<sup>1557</sup> They believe that the use of the term itself causes the sensationalism of the issues involved. This again is an example of the effect of media reporting, in this case the negative impact the method of addressing an issue by the use of a specific term can have. The term ‘knife crime’ is wide in scope and therefore induces greater feelings of fear among the public. The term can be broken down into several different offences. For example, ‘knife crime’ can indicate the possession of a knife in a public place, the use of a knife to cause fear by way of an assault, to cause actual bodily harm, to cause malicious wounding, and to murder.

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<sup>1550</sup> Y.Jewkes *Media and Crime*, *op cit* fn 1527 at 3.

<sup>1551</sup> N.Morris ‘Knife Crime Rises Fast as Muggers Target Gadgets’, (*The Independent*, 20 January 2012).

<sup>1552</sup> BBC News, ‘Boy, 16, Stabbed to Death in South-east London’, (1 July 2011), <<http://www.bbc.co.uk/news/uk-england-london-13998923>> (accessed on 20/07/11).

<sup>1553</sup> BBC News, ‘Boy, 14, Stabbed in Neck in Coventry’, (4 October 2011), <<http://www.bbc.co.uk/news/uk-england-coventry-warwickshire-15163495>> (accessed on 10/10/11).

<sup>1554</sup> *Evening Standard*, ‘Boy, 16, Knifed in Takeaway Gang Attack’, (19 April 2011), at 24.

<sup>1555</sup> A.Silvestri et al. *op cit* fn 564 at 68.

<sup>1556</sup> C.Eades et al. ‘Knife Crime’ A Review of Evidence and Policy, *op cit* fn 495 at 9.

<sup>1557</sup> This was previously mentioned in Chapter 3, section 3.1.2.

The BBC reported a 10 per cent increase in knife robberies in 2012, from information gathered and made available through Police Recorded Crime, '*Police recorded 15,313 robbery offences involving a knife compared with 13,971 in the 12 months to Sep 2012*'.<sup>1558</sup> This report is an attempt to reflect the reality of knife crimes, showing their occurrence and noting the type of crimes that were facilitated. This unquestionably produces fear as it is a report which shows an increase in crime, without contextualising the stories and explaining potential reasons for the increase. The impact of media reporting of these crimes is also clear, and has strong potential to influence the consumer. Another report by the BBC explains that '*knives are used in about 8% of violent incidents, according to the BCS*', and presents potential reasons behind knife carrying '*they are the people who fear being attacked with knives, they carry them because they are scared and for respect ... There is a level of desperation on the streets, brought about by poverty, which is creating a culture of fear*'.<sup>1559</sup>

News accounts of knife crimes often draw attention to the fact that these are crimes occurring mainly in urban areas, and large inner cities. However, the *Western Mail* has shown that it is a more common problem elsewhere than is often assumed, bringing knife crime to light within the context of Wales. The story reported that '*It is a sobering and also a frightening thought that a minority of teenagers are regularly arming themselves with weapons, including knives and loaded shotguns. Some 200 teens have been arrested for such offences in Wales*'.<sup>1560</sup>

A potentially negative effect of such reporting of knife crime is that these representations may '*communicate the idea that, for teenagers, carrying knives has become a fashion statement, can have the effect of becoming a self-fulfilling prophecy*'.<sup>1561</sup> Due to the fact that knives are easily accessible, such stories are dangerous as they lead to the impression that a large number of young people are

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<sup>1558</sup> BBC News, 'Knifepoint Robberies Rise by 10%, Crime Figures Show', (19 January 2012), <<http://www.bbc.co.uk/news/uk-16626558?print=true>> (accessed on 08/05/12).

<sup>1559</sup> C.Summers 'Is Knife Crime as Common as we Think?' (*BBC News*, 27 May 2008), <<http://www.newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/uk/7421534.stm>> (accessed 08/05/12).

<sup>1560</sup> *Western Mail*, 'Don't Demonise a Generation in Identifying Young People with Weapons', (10 January 2011).

<sup>1561</sup> *The Week*, 'Media Obsession Risks Normalising Knife Crime', (15 July 2008), <<http://www.theweek.co.uk/26439/media-obsession-risks-normalising-knife-crime>> (accessed on 16/08/15).

carrying weapons,<sup>1562</sup> and that they are necessary in order to remain safe and enable protection, which may influence the decision to carry weapons.

Closely related to the reporting of knife crime in the news is the attention given to young people in connection with crimes of violence. The news constantly refers to the young age of both victims and perpetrators in connection with such crimes. This paints a bleak picture of youths, which is problematic as the involvement of young people in crime should not be exaggerated.<sup>1563</sup> Notably, young people find the negative portrayals in the media of their generation as being unfair and difficult to overcome. The study suggests that although there is a need to '*highlight the problem of knife crime in our society, we also need to give our young people better things to aspire to*',<sup>1564</sup> and claims that a potential way to achieve this would be to draw attention to positive images of young people and awarding their achievements. The research also highlights that '*99% of young people are decent and admirable and we should be promoting them positively*',<sup>1565</sup> which should not be forgotten. This highlights the need for representative reporting.

The same study noted the potential dangers of negative media portrayals of young people. It suggests that the feeling among those interviewed was that they are all stereotyped as criminals and that this sends out the wrong message to young people. A key issue discovered by the report was that:

*'the more stories that the media tells about knife and gun crime, the more young people will feel that carrying weapons is a way to get notoriety and fame. By endlessly printing or showing stories about violent crime young people can become fooled into thinking it is glamorous, or it is the only way to get their name known to the world, and so will not worry about the consequences of being caught'*.<sup>1566</sup>

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<sup>1562</sup> *New Statesman*, 'MPs Warn of Knife Crime "Arms Race"', (2 June 2009), <<http://www.newstatesman.com/2009/06/knife-crime-committee-young>> (accessed on 16/08/15).

<sup>1563</sup> C.Wells & O.Quick Lacey, *Wells and Quick: Reconstructing Criminal Law: Text and Materials*, *op cit* fn 1141 at 202.

<sup>1564</sup> B.Kinsella *Tackling Knife Crime Together - A Review of Local Anti-Knife Crime Projects - Executive Summary*, *op cit* fn 814 at 2.

<sup>1565</sup> *ibid.*

<sup>1566</sup> B.Kinsella *Tackling Knife Crime Together - A Review of Local Anti-Knife Crime Projects*, *op cit* fn 553 at 6.

Hence it claims that the effects of news reporting on young people can in fact encourage the carrying of weapons, as it reinforces fears and insecurities. The conclusion reached was that broadcasting and reporting more positive stories would be beneficial. Although there is a generalisation that ‘bad news sells’, this must be balanced with positive stories as well.<sup>1567</sup> Otherwise, the media becomes a part of the vicious circle surrounding weapons’ possession, as those at risk of becoming victims are already at risk of carrying due to their dangerous surroundings. Negative reporting could encourage such individuals to carry for fear of an increase in knife crime incidents, and the need for self-defence.

#### **6.2.5 Self-defence and the media**

Similarly, stories involving self-defence in the media domain are also often misleading, and generate outrage among the public who misunderstand the law. Indeed, a poll conducted by ComRes for the *ITV Tonight* programme discovered that 50% of householders were confused about the law, and 11% did not understand the law at all.<sup>1568</sup> The law in this area is often portrayed as being unfair and in need of reform, even though in practice it works well. This has already been discussed in Chapters 2 and 4, but considering the role and impact of media reporting on the topic is important. It is only mentioned briefly again here in order to present an example of the stories reported in this context.

One prime example involving demands for a change in the law of self-defence is the following story in *The Telegraph*. The headline itself screamed for attention, ‘*Vulnerable pensioners need the self-defence law changed*’.<sup>1569</sup> The story was accompanied by a gruesome picture of an elderly woman who had been beaten by an intruder in her home, again influencing the public and attracting reactions of outrage,

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<sup>1567</sup> B.Kinsella *Tackling Knife Crime Together - A Review of Local Anti-Knife Crime Projects - Executive Summary*, *op cit* fn 814 at 7.

<sup>1568</sup> *ITV*, ‘Poll: 50% of Homeowners Confused over Self-defence Law’, (27 September 2012), <<http://www.itv.com/news/update/2012-09-27/poll-50-of-homeowners-confused-over-self-defence-law/>> (accessed on 04/08/13).

<sup>1569</sup> K.Miller & J.Gavaghan ‘Vulnerable Pensioners Need the Self-defence Law Changed’, (*The Telegraph*, 7 November 2004), <<http://www.telegraph.co.uk/news/uknews/1476028/Vulnerable-pensioners-need-the-self-defence-law-changed.html>> (accessed on 20/01/11).

claiming that the law was to blame for her situation. The report referred to the fact that a survey had recently been conducted by *The Sunday Telegraph* which

*‘showed overwhelming public support for a change in the law to give people new powers to fight back against intruders. The poll, conducted by ICM, revealed that 72 per cent of people believe that the current law, allowing householders to use only “reasonable force” against intruders, is “inadequate and ill-defined”’.*<sup>1570</sup>

This was used to strengthen the argument for a change in the law, painting the picture that there is no doubt that this is what the public wanted, and therefore the Government must respond. This is a clear illustration of the public perception in relation to the rights of self-defence in the home, before the amendment to the householder standard was introduced, that the law was balanced in favour of the criminal intruder and not the innocent householder.<sup>1571</sup>

Other examples demonstrating the sensationalist element in crime reporting are the following headlines: *‘Now you can bash a burglar’*<sup>1572</sup> and *‘Man who killed burglar will not be charged’*.<sup>1573</sup> These headlines have a strong impact as self-defence is a topic attracting significant media attention, and is a subject on which almost everybody has an opinion.<sup>1574</sup>

A notable example is the prosecution of Anthony Martin,<sup>1575</sup> the Norfolk farmer who shot two burglars on his property in 1999, which is arguably one of the most well-known cases, and one of the most widely reported cases connected to self-defence. A report of the case in *The Guardian* demonstrates the public outrage that followed his conviction, and Martin’s status as a form of ‘folk hero’, in the headline that read *‘The killer who won a nation’s sympathy’*.<sup>1576</sup> His was a case epitomising the nature of self-

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<sup>1570</sup> *ibid.*

<sup>1571</sup> See J.Chapman & J.Doyle ‘The Legal Right to Protect your Home: Owners will be Able to Fight off Burglars without Fear of Prosecution’ (*Daily Mail*, 22 June 2011), <<http://www.dailymail.co.uk/news/article-2006245/Criminal-justice-Legal-right-protect-home-fear-prosecution.html>> (accessed on 05/10/11).

<sup>1572</sup> M.Hall ‘Now You Can Bash a Burglar’, *op cit* fn 883.

<sup>1573</sup> H.Carter ‘Man who Killed Burglar will not be Charged’, *op cit* fn 1019, at 17.

<sup>1574</sup> D.Barrett ‘Senior Police Back More Rights for Householders to Defend’, (*The Telegraph*, 26 December 2009), <<http://www.telegraph.co.uk/news/uknews/law-and-order/6889626/Senior-police-back-more-rights-for-householders-to-defend-themselves.html>> (accessed on 19/05/11).

<sup>1575</sup> *R v Martin*, *op cit* fn 59.

<sup>1576</sup> S.Morris ‘The Killer Who Won a Nation’s Sympathy’, *op cit* fn 879.

defence, and the public opinion that persons faced with intruders in their homes should be lawfully permitted to use any force in self-defence, without facing prosecution. The case hurtled the issue into the public domain and produced many calls for law reform. Indeed, '*the incident ignited a furore in Britain*'<sup>1577</sup> due to the dissatisfaction at his conviction. Nevertheless, because of the circumstances of the case, that he had shot the burglars while they were fleeing and no longer posing a threat to him or his property, Martin's case fell outside the scope of self-defence.

The danger of wide scale press reporting of self-defence is that it can contribute to public confusion regarding the law, and it instils a sense of fear among society. For example, having been exposed to the risks, people are more likely to attempt to prepare themselves. A survey by Confused.com found that '*some 49 per cent of the nation's households admit keeping a household item for use against intruders ... of this number, 66 per cent say they are not afraid to use such a weapon in self-defence against an intruder in the event of a break-in*'.<sup>1578</sup> The effects of such media reports feed the culture of fear regarding home intrusions and leads to calls for changes in the law, which are often used opportunistically by political parties. As discussed in Chapter 4, this was the result in respect of passing the new householder standard, as it was a matter of populist politics.

This is another danger inherent in the media reporting of self-defence, as despite the adequate operation of the law in most cases through the test of reasonable force, the representations by the media place the topic at the top of the public and political agenda time and time again.<sup>1579</sup> Peelo argues that the reporting of crime has been framed within policy debates, and that crime has therefore become '*a site of contest between competing groups with competing world views concerning how society should be run and control of crime agendas is about social and political power*'.<sup>1580</sup>

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<sup>1577</sup> BBC News, 'Tony Martin: Crime and Controversy', *op cit* fn 1032.

<sup>1578</sup> N.Loderick 'Brits Keep Items to Fend Off Burglars', (*Confused.com*, 12 July 2013), <<http://www.confused.com/home-insurance/articles/half-of-brits-keep-household-item-as-weapon-to-fend-off-burglars>> (accessed on 04/08/13).

<sup>1579</sup> See for example, J.Bingham 'Businessman Jailed for Attacking Intruder – Who Goes Free' (*The Telegraph*, 14 December 2009), <<http://www.telegraph.co.uk/news/uknews/law-and-order/6811239/Businessman-jailed-for-attacking-intruder-who-goes-free.html>> (accessed on 19/05/11).

<sup>1580</sup> M.Peelo, *op cit* fn 1453 at 170-171.

Violence has become an activity exploited for political purposes,<sup>1581</sup> and this is relevant to considerations on the law of self-defence and knife crime. This provides an opportunity for manipulation by the political parties to amend the law to please the public and gain more votes.<sup>1582</sup> This is problematic as the law should only be modified when necessary, and not as a result of public misunderstanding and political opportunism.

It is therefore clear that the media, particularly the news media, can have influential roles within policy debates as they shape public opinion and demand changes to be made in the law.

### **6.3 Conclusion**

It has become clear through the course of this chapter that emotions and the media can impact on public opinion and understanding of self-defence and offensive weapons. Emotions were explored as factors present in the commission of crimes and the determining of the appropriate penalty. Emotion, particularly fear, is a relevant factor which can be the main reason that somebody responds in the manner that they do. This seemingly provides an indication of an acceptable basis for the defence of self-defence, although fear by itself is not a good reason for possessing an offensive weapon. The power of emotions and their capacity to overcome individuals have been evaluated, and they are clearly relevant considerations within the field of criminal law.

Nevertheless, technically, emotions are not taken into account in legal decision-making. Emotions are only directly considered in relation to the defence of loss of control, and even then, there is a requirement that another person of ordinary

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<sup>1581</sup> It is also worth noting as an aside point that the media are also often guilty of using crime to their gain. Namely, certain stories will attract greater interest than others, and certain features within individual stories are allocated far more discussion, although other elements are also engaged. Representations rarely fully capture the reality of the situation, which is why so many different methods and mediums of media have been developed to try to capture the reality. For more discussion see P.Mason (ed), *op cit* fn 1462 at 2.

<sup>1582</sup> See section 4.2.2(f) in Chapter 4. See also fn 876 on page 177, and fn 990 on page 205, for a discussion on Mendelle, P. Self-defence law shows how politicians use legislation as PR, *The Guardian*, 31 October, <<http://www.theguardian.com/law/2011/oct/31/self-defence-law-legislation-pr>> (accessed on 04/08/13).

tolerance could have reacted in the same way.<sup>1583</sup> However, emotions are indirectly relevant to self-defence, as the fear felt influences the reasonableness of the defensive action.<sup>1584</sup> It can therefore be indicative of lawful self-defence. As has been illustrated, there are clearly many considerations and pressures at play in the fields of self-defence and weapons offences.

The media and the news media in particular, also have a role in assisting the public to understand criminal activity. There are many different sources of texts and media that are informative to this research, both regarding self-defence and knife crime. Crime is a major topic in the media and has a huge public interest. Consequently, there is much in the news, on television, in films and in books that may provide valuable insight into the factors surrounding the debates on these topics. The danger with using such sources, and relying on media representations of crime as a source of information, is that they often create a '*false picture of crime which promotes stereotyping, bias, prejudice and gross oversimplification of the facts*'.<sup>1585</sup> As explained in the chapter, there is a risk also of forgetting that they are merely representations, and interpreting all media forms as reality, whereas it is possibly only the news media that should be an expected source of real facts.

Despite the fact that studies have not found a significant correlation between the media and either the commission of crime or fear of crime, it has been shown that the news certainly does have some effects on society. It has an influential role in the shaping of public opinions about crime as it facilitates '*a key moment in the process whereby public discourses covering crime and justice are made available for general consumption*'.<sup>1586</sup> It is the main medium for the communication of information to the public about crime, and a forum for political discourse. It can be considered to have influenced the change of law to permit disproportionate force for householders acting in self-defence, as the change was shaped by public dissatisfaction with the law and a political desire to be seen to balance the issue in favour of the innocent householder.

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<sup>1583</sup> A.Reilly, *op cit* fn 1449 at 130-131.

<sup>1584</sup> *ibid* at 141.

<sup>1585</sup> Y.Jewkes *Media and Crime*, *op cit* fn 1527 at 141.

<sup>1586</sup> P.Schlesinger H.Tumbler & G.Murdock 'The Media Politics of Crime and Criminal Justice' (1991) in C.Greer (ed), *Crime and Media: A Reader*, (Routledge, Abingdon, 2010), at 255.



## **Chapter 7: Conclusion**

### **7. Final conclusion**

This thesis has explored the length and breadth of the law of self-defence with a particular focus on the relationship between the defence and offences involving offensive weapons. It has demonstrated that the interplay between these legal fields is complex and often uncertain. The two central themes have been the analysis of the extent to which self-defence can provide a defence to weapons possession offences, and the reasons why the law differentiates based on location. It is clear that location has become an important variable in the legal application of self-defence, and it is a direct component of weapons possession offences. In focusing on these two central themes, the research has highlighted a number of important issues pertaining to self-defence.

#### **7.1 The scope of self-defence as a defence to weapons offences**

With regard to the first theme, the relationship between the defence and offensive weapons displays a contradictory approach. This is apparent in the fact that self-defence provides a defence to any physical force exerted, but not to the lesser harm causing offence of weapon possession. The concept of harm demonstrates that risk and potential to cause harm are key principles in prohibiting weapons. The relevance of self-defence to such offences was explored alongside the statutory defences of 'good reason' and 'reasonable excuse'. Although there is some confusion in that self-defence justifies the defensive action but not the enabling act of possession, it appears sensible that the complete defence is probably not the most appropriate for these possession offences. This is partly due to the justificatory nature of self-defence. While not necessarily crucial in terms of practical interpretation by the courts, the classification of defences as justifications or excuses are theoretically indicative of the nature of a defence, and whether it merely reduces or removes punishment. Therefore, the classification of self-defence as a justification explains why it is an inappropriate defence for weapons offences, as it makes a powerful statement that the action is not wrongful. If this were applied to offensive weapons, it would destabilise the objective

of the legislation, and could send misleading signals that possession is generally lawful as a preparatory act in self-defence.

This is certainly a grey area of law, and some divergent interpretations have emerged. The courts have taken a narrow approach in interpreting the legislation in order to apply its purview of keeping weapons off the streets and society safe.<sup>1587</sup> There is a strong motivation behind the prohibition of possession to decrease the general threats that such items present both to specific identifiable individuals, and to collective society.

With regard to offensive weapons and bladed articles, fear and self-protection are the most common reasons for possession.<sup>1588</sup> However, the courts have traditionally taken a strict approach to the relevance of fear, and it will only be considered a ‘good reason’ or ‘reasonable excuse’ if also accompanied by evidence of an imminent attack. The case of *R v Clancy*<sup>1589</sup> has thrown some doubt on this as it suggests that fear can be sufficient. There is therefore a need for further express clarification on whether or not fear can support a defence within such contexts. A consistent approach must be developed here, and fear should be permitted as a consideration in cases of self-defence and weapons possession if appropriate. It may be said that it would be appropriate if there was clear evidence that fear was the leading ingredient forming the decision to act, and there was reasonable cause for the person to be fearful.

Fear is evident not only from the defender’s perspective, but also in society’s reaction to media representations on the purported rise of weapons possession. Over the years since the commencement of this research, and before embarking on this study, moral panics have surfaced over the presence of knives on the streets.<sup>1590</sup> This has fuelled political debates and policy decisions on the issue, and has also resulted in the establishment of many organisations, partnerships, voluntary projects, and youth

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<sup>1587</sup> *R v Povey, R v McGeary, R v Pownall and R v Bleazard* *op cit* fn 625.

<sup>1588</sup> C.Eades et al. ‘Knife Crime’ A Review of Evidence and Policy, *op cit* fn 495 at 21-22; UK Data Service, *Offending Crime and Justice Survey*, *op cit* fn 752; S.Roe & J.Ashe, *op cit* fn 753 at 14; D.Sethi et al (eds), *op cit* fn 495 at v-vi; D.Shaw et al. *op cit* fn 523 at 269.

<sup>1589</sup> *R v Clancy* *op cit* fn 687.

<sup>1590</sup> R.Sparks ‘Entertaining the Crisis: Television and Moral Enterprise’ *op cit* fn 513 at 54-56; I.Marsh & G.Melville ‘Moral Panics and the British Media – A Look at Some Contemporary ‘Folk Devils’’, *op cit* fn 514 at 2.

groups to tackle the problem of knife possession. It has been shown that there are certain risk factors that render individuals more likely to carry a weapon, and that surroundings play a significant part in this. The majority of knife crime incidents occur in areas of social depravation, with high unemployment and poverty rates, and neighbourhoods where a gang culture is present among young people.<sup>1591</sup> The development of projects and organisations that seek to modify behaviour by increasing options for individuals living in areas with high rates of knife crime is very important as these initiatives represent an alternative to legal intervention. There are limits to the power of the law to address the issues of possession as it responds retrospectively. Therefore, these organisations provide a valuable proactive method of reducing the amount of weapons in circulation and the number of young people carrying weapons in high risk locations.<sup>1592</sup> Sensitive town and country planning can also have a beneficial effect in creating crime reducing environments.

## **7.2 Location as a distinct variable in the law**

The second central theme of the research is timely as significant legal changes have occurred on the matter in recent years. At the time of commencing this study, there were discussions that the law would be amended to provide enhanced protection to householders acting in self-defence in their own home against intruders. During the course of researching and writing this thesis, the law was indeed reformed. However, this change was unnecessary, as the ‘reasonable force’ test adequately provided the necessary flexibility for application as required on a case-by-case basis. As discussed, the overall assessment of the opposing arguments supported maintaining the test as it was, as opposed to introducing the new amendment.<sup>1593</sup>

Uncertainty surrounds the real effect and scope of the new provision, and to what extent it will change the law of self-defence. Case-by-case decisions may not see a radical departure from the previous test. Nevertheless, permitting disproportionate

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<sup>1591</sup> P.Squires et al. *Street Weapons Commission: Guns, Knives and Street Violence*, *op cit* fn 557 at 107; S.Antrobus (chairman), *Breakthrough Britain: Dying to Belong*, *op cit* fn 558 at 25-26; B.Kinsella *Tackling Knife Crime Together - A Review of Local Anti-Knife Crime Projects*, *op cit* fn 553 at 2; A.Silvestri et al. *op cit* fn 564 at 22.

<sup>1592</sup> B.Kinsella *Tackling Knife Crime Together - A Review of Local Anti-Knife Crime Projects - Executive Summary*, *op cit* fn 814 at 1-3.

<sup>1593</sup> See section 4.2.2.

force is a dramatic change, and will certainly affect some individual cases, as well as perhaps change perceptions about the defence. It may encourage people to use force where they would not have previously, or to use more force than they previously would have. Increasing the safety-net for householders may influence attitudes to become more akin to those of the United States which has a much more open policy on self-defence and the right to bear arms.<sup>1594</sup>

A clear distinction now exists between self-defence in a private and a public space. The element of location illustrates that the castle doctrine is influential in the change of law to provide greater flexibility for householders. Criticism of this reform formed a significant part of the thesis, as the reasons for creating a new test within householder cases was unsupported either by persuasive need or empirical evidence. The importance of location for individuals was examined and shows that rather than being purely a matter of analysing location based on a home/non-home dimension, the key factor in the legislation is in fact the inside/outside dimension. This reflects the role of the home as a barrier from outside interference. Thus, the status of the aggressor as a trespasser was the catalyst for the enhanced legal protection for householders. This emphasis on trespassers is misguided and creates inconsistencies based on the aggressor's status, and an arbitrary position for vulnerable victims defending within their homes.<sup>1595</sup>

In seeking a justification for the greater protection offered to householders, a satisfactory answer to the question 'why is the home treated differently to public places in self-defence?' was not found. It is maintained here that the defence should provide the same level of protection to all individuals regardless of the circumstances, and that the creation of two separate tests was unnecessary. The home was contrasted with public places and it was highlighted that the home is a special entity. It offers a safe haven for individuals, a place of control where they have the power to invite or reject entry as they deem appropriate. Nevertheless, it is contended here that public places should also be safe for everyone, and that the notions of the home as a castle and fortress ignores the plights of victims of domestic abuse, the homeless, and some

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<sup>1594</sup> See page 122 for discussion.

<sup>1595</sup> See fn 1186.

young people who feel a greater sense of affinity in the public sphere.<sup>1596</sup> The discussion on this aspect indicates a strong sense of attachment and that emotions might be shaping the different perceptions of location. Similarly, the levels of harm caused may be influential. It is possible that the level of harm suffered is greater in private places, as home intrusions offend more than the individual's property rights, but also their privacy, autonomy, and general safety at home.

However, in seeking to explain the householder distinction, the justificatory theories of self-defence are not easily extended to the enhanced provision. Many theories have been developed over the years, but for the purposes of this research the focus was placed upon rights and forfeiture; natural law; consequentialism; forced choice; double effect; and autonomy. Each separate theory has advantages and disadvantages in its ability to explain why self-defence is permissible. It is undesirable to select merely one of these theories and to forcefully mould it into a fully justificatory theory of self-defence, as there are aspects that cannot be explained by recourse to any theory by itself. Rather, it is proposed that a combination of these theories would achieve the most complete underlying framework for the defence.<sup>1597</sup> Notably, none of these theories convincingly explain or succeed in justifying the householder provision, as it is contrary to the fundamental nature and purpose of self-defence. The reason for this is that necessity and proportionality are required for a just application of the defence. Therefore, the lack of proportionality requirement creates an imbalance in the competing interests involved when assessing self-defence.

When considering why disproportionate force has been permitted, it appears that the change of legislation has been largely shaped by popular politics and the desire to please a public dissatisfied by what they perceived to be an unfair position for householders acting against intruders.<sup>1598</sup> The role of the media in shaping public opinion about self-defence and offensive weapons offences was discussed. Here, it was demonstrated that while it is challenging to conclusively prove media effects on crime, there was evidence to support that media representations are indeed influential

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<sup>1596</sup> It has been stated that some young people '*know no other "home"*' but the streets. See C.Summers 'Is Knife Crime as Common as we Think?', *op cit* fn 1559.

<sup>1597</sup> See section 2.2.7.

<sup>1598</sup> See Crime and Courts Bill Deb, *op cit* fn 891, col 276; and L.Bleasdale-Hill 'Justifying the use of 'Grossly Disproportionate' Force in a Place of Residence', *op cit* fn 965.

and that this has shaped the public perception of self-defence and the belief in a need for greater protection for householders.<sup>1599</sup> This is problematic as the representations often paint a misleading picture of the legal position, and underlies the common misunderstanding of the rules of self-defence and what falls within the test of ‘reasonable force’.

The law expects individuals to exercise a reasonable degree of control over their actions even when affected by fear, anger or other emotions. It is contended that fear is especially relevant to considerations of self-defence and weapons offences. Although not expressly included within the definition of the defence or considered by the courts, it was argued that fear plays a part in cases of self-defence as it indicates reasonableness on the part of the defender. The very nature of self-defence implies fear, and it would be unusual for a case not to involve the emotion. As fear clearly represents the primary reason for self-defence, it is argued that consideration of emotions should be allowed to be fully appreciated in this defence. The consideration of emotions is an explicit part of the defence of ‘loss of control’, with fear or anger satisfying one of the qualifying triggers under the defence. It is submitted that fear should also attract more consideration in cases of self-defence.

### **7.3 Closing Observations**

To conclude, this thesis has arrived at a number of deductions. First, the reasonable force test is an appropriate measurement of self-defence. Second, there should be only one standard of self-defence. This means that the reasonable force test should apply in the same way regardless of the circumstances and location, whether inside or outside the home. Although the test is naturally context sensitive, this is a matter of individual case-by-case application. Despite the clear emotive attachments, meanings and connection of the home, these are insufficient to permit greater force in householder cases. Therefore, the amendments to permit disproportionate force were unnecessary. Third, the relationship between self-defence and offensive weapons or bladed articles is contradictory. The defence permits the greater harm of infliction of injury, but does not justify the lesser harm of possession. It is submitted that while self-defence is not

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<sup>1599</sup> For example, the following article called for greater legal protection: K.Miller & J.Gavaghan ‘Vulnerable Pensioners Need the Self-defence Law Changed’, *op cit* fn 1569.

appropriate, where fear is the reason for possession, the defences of ‘good reason’ or ‘reasonable excuse’ should be more lenient where appropriate.

The change of householder provision has been influenced by an environment where many believe strongly that ‘*Right need never yield to wrong*’,<sup>1600</sup> that defensive rights should be broadly based on the aggressor’s moral fault. Nevertheless, the key component of self-defence is that it is an action taken in response to an unlawful threat or attack, and it is targeted towards resisting aggression only. The primary aim is not the act of causing harm.<sup>1601</sup> The intention or the reason for acting is logically important, as ‘*the morality of what one does has to do with the reasons one does what one does*’.<sup>1602</sup> For self-defence to be justified it must be proved that the defensive force was only exerted in response to the attack faced. The repelling of unlawful force is a morally acceptable reason for acting, and a worthy exception to the criminal law.

The standard of reasonable force with its requirements of necessity and proportionality does not place too heavy a burden on defenders, especially householders. The fundamental point that should be emphasised is that ‘*The criminal law does not require that persons behave perfectly, but only that they behave reasonably*’.<sup>1603</sup>

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<sup>1600</sup> G.P.Fletcher ‘The Nature of Justification’, *op cit* fn 373 at 181.

<sup>1601</sup> G.P.Fletcher ‘Punishment and Self-Defense’, *op cit* fn 1023 at 207.

<sup>1602</sup> T.Kasachkoff, *op cit* fn 53 at 530.

<sup>1603</sup> D.N.Husak ‘Partial Defences’, *op cit* fn 68 at 172.

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